

DOCKET

No. 88-791-CFX
Status: GRANTED

Title: Pavelic & Leflore, Petitioner
v.
Marvel Entertainment Group, et al.

Docketed:
November 10, 1988

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Laufer, Jacob

Counsel for respondent: Slotnik, Sol V., McKay, Robert B.,
Bieler, I. Scott, Arnoff, Norman B., LeFlore, Ray L.

Entry	Date	Note	Proceedings and Orders
1	Nov 10 1988	G	Petition for writ of certiorari filed.
3	Dec 13 1988		Order extending time to file response to petition until January 9, 1989.
5	Jan 6 1989	X	Brief of respondents Marvel Entertainment Group, et al. in opposition filed.
4	Jan 11 1989		DISTRIBUTED. February 17, 1989
6	Jan 20 1989	X	Reply brief of petitioner Pavelic & Leflore filed.
7	Feb 21 1989		Petition GRANTED. *****
9	Mar 31 1989		Order extending time to file brief of petitioner on the merits until April 14, 1989.
10	Apr 14 1989		Joint appendix filed.
11	Apr 14 1989		Brief of petitioner Pavelic & Leflore filed.
13	May 10 1989		Order extending time to file brief of respondent on the merits until May 26, 1989.
14	May 10 1989		Record filed.
		*	Certified copy of original record and proceedings, 6 boxes, received.
15	May 25 1989		Order further extending time to file brief of respondent on the merits until June 2, 1989.
16	Jun 2 1989		Brief of respondents Marvel Entertainment, et al. filed.
17	Jun 2 1989		Brief of respondent Peter S. Shukat, Esq. filed.
18	Jun 5 1989		Lodging received. (40 copies).
19	Jun 30 1989		Reply brief of petitioner Pavelic & Leflore filed.
20	Jul 12 1989		CIRCULATED.
21	Jul 20 1989		SET FOR ARGUMENT MONDAY, OCTOBER 2, 1989. (2ND CASE)
22	Oct 2 1989		ARGUED.

**PETITION
FOR WRIT OF
CERTIORARI**

88-791

No.

Supreme Court, U.S.

FILED

NOV 10 1988

JOSEPH F. SPANIOL, JR.

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

PAVELIC & LEFLORE (now dissolved),

Petitioner,

— against —

THE MARVEL ENTERTAINMENT GROUP, a division
of CADENCE INDUSTRIES CORPORATION, JAMES
GALTON, AL BRODAX, MICHAEL S. KLEIN, THE
SHUKAT COMPANY, LTD., SCOTT SHUKAT and
PETER S. SHUKAT, ESQ.,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

1. Should this Court resolve a direct conflict in the decisions of two federal courts of appeals regarding the power of a district court to sanction, under Rule 11, Fed.R.Civ.P., the law firm of the signer of a pleading?

2. Did the court of appeals' circumvention of the plain language and mandate of Rule 11 in imposing sanctions not only on the signer of a pleading but also on the law firm of which he was a member, conflict with decisions of this Court governing statutory construction?

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List of Parties

The parties to the court of appeals proceeding were:

Northern J. Calloway, individually and on behalf of LMN Productions, Inc.
-- Plaintiff-Appellant-Cross-Appellee;

The Marvel Entertainment Group, a division of Cadence Industries Corporation, James Galton and Al Brodax
-- Defendants-Appellees-Cross-Appellants;

Michael S. Klein, Luis Quiros, The Shukat Company, Ltd., Scott Shukat, Peter S. Shukat, Esq. and, where necessary, LMN Productions, Inc.
-- Defendants-Appellees;

Ray LeFlore, individually and as a partner of Pavelic & LeFlore (now dissolved) and Pavelic & LeFlore
-- Appellants-Cross-Appellees.

Opinions Below

The opinion of the court of appeals (App.A, infra) is reported at 854 F.2d 1452. The opinion of the district court (App. B, infra) is reported at 111 F.R.D. 637. The opinion of the district court on petitioner's motion under Rule 60(b), Fed.R.Civ.P., (App. C, infra) is reported at 650 F.Supp. 684.

Jurisdiction

The judgment of the court of appeals was entered on August 12, 1988; the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statute Involved

Rule 11 of the Federal Rules of Civil

Procedure provides:

"Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper

purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

Statement

In August, 1982 plaintiff Northern J. Calloway retained attorney Ray LeFlore ("LeFlore") to bring an action for, inter alia, copyright infringement, breach of fiduciary duty and fraud against Calloway's business partners, his theatrical agent, his former attorney,

and others. Calloway sought \$11 million in compensatory damages and substantial punitive damages. The core federal issue was whether or not the defendants had infringed Calloway's copyright in a script for a proposed movie.

The original complaint, signed by LeFlore, was dismissed on technical grounds. That complaint had included as exhibits copies of contracts bearing Calloway's signature, the authenticity of which was not then disputed. An amended complaint, also signed by LeFlore, was filed on August 1, 1983. The amended complaint alleged that the exhibits to the original complaint contained facsimiles of Calloway's signature that had been improperly affixed by a defendant ("the facsimile claim"). This facsimile

claim was successfully used by Calloway to defeat a March 1984 motion for summary judgment, but was abandoned shortly before trial and replaced by two new claims.

The case was tried before a jury during April and May 1986. The jury found against Calloway on each of his claims.

On August 1, 1986, the district court ruled that Rule 11 sanctions were appropriate as to the facsimile claim. (See Appendix B, infra). The district court imposed Rule 11 sanctions in the amount of \$100,000 against Pavelic & LeFlore (a firm that was formed by LeFlore during October 1984) on the ground that the facsimile claim was factually unfounded. See App. B, p. 135a. The specific documents found to have been signed in violation of Rule 11 were the

original and amended complaints, the papers submitted in opposition to the motion for summary judgment, answers to interrogatories (signed June 3, 1985) and a proposed¹ pre-trial order (submitted March 25, 1986). App. A, pp. 25a-26a; 37a-39a; 65a. Only the answers to interrogatories and proposed pre-trial

1. According to the practice in some jurisdictions, a proposed order is not a document properly subject to Rule 11 sanctions inasmuch as the Court, not the submitting counsel, actually signs the order. See Snow Machines, Inc. v. Hedco, Inc., 838 F.2d 718, 726 n.9 (3rd Cir. 1988).

order had been signed during the life of the Pavelic & LeFlore partnership.¹

Two weeks later, the firm of Pavelic & LeFlore was dissolved by Pavelic. Pavelic & LeFlore was during most of its existence a firm of two partners - Radovan Pavelic, a corporate lawyer, and Ray LeFlore, a litigator.

1. Sanctions in the amount of \$23,000 were also imposed against Pavelic & LeFlore under 28 U.S.C. §1927 for failing to accept an offer of settlement from the defendant Luis Quiros made in February 1986. These sanctions were reversed by the court of appeals.

Petitioner moved under Fed.R.Civ.P. 60(b) to relieve the firm of the sanctions. The district court granted the motion in part and relieved the firm of one-half of the sanctions because the firm had only existed since October 1984, the approximate midpoint in the litigation. See App. C, p. 156a, infra, 650 F. Supp. 684, 688.

Pavelic appealed the district court's imposition of sanctions against Pavelic & LeFlore on the ground that the offending documents had been written and signed by

LeFlore.¹ Accordingly, petitioner argued, Rule 11 permitted sanctions only against LeFlore, and not against the law firm.

Rejecting petitioner's interpretation of Rule 11, the court affirmed, holding that ". . . Rule 11 sanctions should generally be imposed on a signer's law firm as well as on the individual signing the offending paper . . ." (App. A, p. 61a).

Reasons for Granting the Petition

This case presents an important question of federal law: whether Rule 11

1. In many critical instances, LeFlore had signed these documents long before the formation of Pavelic & LeFlore and while he was a member of a different firm, LeFlore & Egan.

Fed.R.Civ.P. permits the imposition of sanctions only against the individual signer of a pleading or whether the signer's law firm may also be sanctioned.

In addition to its intrinsic significance, this issue requires the attention of this Court in order to resolve a conflict of decisions between the Second and Fifth Circuit Courts of Appeals.

Finally, this Court's intervention is required to remedy the court of appeals' resolution of this federal question in a manner that conflicts with decisions of this Court governing statutory construction.

As this Court has repeatedly observed, the starting point of statutory construction is the statute itself. Landreth Timber Co. v. Landreth, 471 U.S.

681, 685 (1985); Diamond v. Chakrabarty, 447 U.S. 303, 308 (1980); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

The Federal Rules of Criminal and Civil Procedure, propounded pursuant to the authority granted this Court under 18 U.S.C. §687 (1946 ed.) (currently codified, as amended, at 18 U.S.C. §3771), and 28 U.S.C. §2072, respectively, are, "in every pertinent respect, as binding as any statute duly enacted by Congress and federal courts have no more discretion to disregard the Rule[s'] mandate than they do to disregard constitutional or statutory provisions." The Bank of Nova Scotia v. United States, 56 U.S.L.W. 4713, 4715 (June 22, 1988) (addressing Rule 52, Fed.R.Crim.P.).

Rule 11 requires that every pleading motion or other paper be signed by "at least one attorney of record in the attorney's individual name," or by any pro se party. The signer certifies that he or she has read the paper, that a reasonable inquiry was conducted and that on the basis of that inquiry, the signer believes that the paper is well grounded in fact and supported by existing law or a good faith argument for a change in existing law, and was not interposed for an improper purpose.

If a paper is signed in violation of the foregoing, Rule 11 directs that "the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . ."

Significantly, Rule 11's sanctioning language does not provide for the

imposition of sanctions upon attorneys who "advised"¹ "permitted" or even "encouraged" the filing of an offending document, or who employed the signer of such a document. Nor does it hold the signer's partners responsible for its sanctions. To the contrary, the Rule's emphasis on individual responsibility is evident from its requirement that the paper be signed in the "attorney's individual name" and its frequent reference to the actual "signer"² and the

1. Compare Fed.R.Civ.P.37 (d) permitting sanctions against the "attorney advising" the party failing to comply with discovery demands.

2. Derivations of the words "sign" and "signer" appear in Rule 11 no fewer than seven times.

signer's personal certification as to his or her belief. The plain text of Rule 11 supports only the conclusion that the sanctions are to fall solely on the shoulders of the individual signer.

Thus, in Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987), the Court held that

"the text of [Rule 11], the Advisory Committee Note, and the cases decided under rule 11 make it clear that an attorney must actually sign a 'pleading, motion [or] other paper' in order to have sanctions imposed against him under rule 11."

808 F.2d at 1128-29.

The plaintiff in Robinson had argued that because the law firm name, "Black & Ewart", appeared above the individual attorney Black's signature on offending papers, sanctions against Ewart were appropriate even though he did not sign

the papers. The court responded with the observation that:

"Rule 11 requires a . . . paper to be signed by at least one attorney 'in his individual name.' Fed.R.Civ.P.11 (emphasis added). Thus, it is the attorney who signs the document, not the firm to which that attorney belongs, that certifies that the document conforms to the requirements of the rule and accepts responsibility if it does not."

808 F.2d at 1132.

Similarly, in In re Ruben, 825 F.2d 977 (6th Cir. 1987), cert. denied 108 S.Ct. 1108 (1988), the court of appeals refused to impose sanctions on an attorney, Ruben, who had appeared as "additional counsel." The court observed that "[b]ecause Ruben did not sign any of the pleading or papers filed in the district court, Rule 11 simply [could] not support the sanction against him." 825 F.2d at 984 (citation omitted). Cf.,

Gaiardo v. Ethyl Corp., 835 F.2d 479, 484 (3rd Cir. 1987) ("Rule 11 sanctions are improper in situations which do not involve signing a paper.")

The statutory conclusion of these courts is consistent with the reality that it is an individual member of the bar of a court, not his firm, who appears as attorney of record for a party, see General Rules of the United States District Courts for the Southern and Eastern Districts of New York Rule 3(c) ("An attorney who has appeared as attorney of record for a party may be relieved or displaced only by order of the court . . .").

It is consistent also with this Court's admonition that sanctions against counsel that are not founded in specific statutory authority must be preceded by "a specific

finding as to whether counsel's conduct . . . constituted or was tantamount to bad faith . . ." Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980).

In contrast to these decisions, the court below substantially rested its affirmance of the Rule 11 sanctions awarded against Pavelic & LeFlore on principles of New York agency and partnership law, reasoning that:

"[a]llthough Rule 11 provides for sanctions against the 'person who signed' the offending paper, sanctions need not be restricted to individuals because a law firm may be as much the endorser of a paper as the individual attorney who signs it."

App.A, p. 61a.

The lower court's analysis¹ misses the mark because the rule does not refer to

1. The judicial authority cited in support of the circuit court's interpretation is not compelling. Of the four decisions upon which it relied, three do not contain reasoned analysis of the issue before this court. Frazier v. Cast, 771 F.2d 259, 266 n.6 (7th Cir. 1985); Anschutz Petroleum Marketing Corp. v. E.W. Saybolt & Co., 112 F.R.D. 355 (S.D.N.Y. 1986); and Sony Corp. v. S.W.I. Trading, Inc., 104 F.R.D. 535 (S.D.N.Y. 1985). In the fourth decision, Golden Eagle Distributing Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D.Cal. 1984), rev'd on other grounds, 801 F.2d 1531 (9th Cir. 1986), the court imposed sanctions upon the firm "responsible" for the preparation of the paper at issue, although it was signed by local counsel, opining without authority that those who actively participate in the preparation and decision to file a paper should be held accountable. 103 F.R.D. at 125 n.1

an "endorser"; the rule refers to a signature "in the attorney's individual name." Moreover, as a policy matter, the interpretation of Rule 11 should not vary throughout the nation according to the vagaries of the individual states' partnership law; Rule 11 should not flex and contract depending upon the offending signer's status as a sole practitioner, member of a partnership or officer of a professional association.

The court of appeals' assertion that its interpretation of Rule 11 best serves the purposes of the rule as expressed in the legislative history is also unavailing.

The circuit court's stated concern that "limiting sanctions to the signer might encourage the sharp practice of having the most junior (or most

impecunious) attorney sign a potentially offending paper" (App. A, p. 63a), does not reflect the realities of law firm practice. First, it is unduly cynical to assume that seasoned attorneys will cravenly joust with the courts, using youths as their shields. Second, it is unduly disheartening to believe that "junior" attorneys will so compromise themselves. Third, Rule 11's sanctions are not restricted to money; it is fair to assume that poor lawyers are equally undesirous of being sanctioned, disbarred or suspended from practice as are wealthy lawyers.

Moreover, law firms will seek to ensure they are not stigmatized by a judicial finding of professional wrongdoing or patent negligence by one of their attorneys. In this era of computerized

legal research, such sins are forever accessible to the bench and bar.

Given Rule 11's straightforward authorization of sanctions only against the signer, resort to legislative history is unnecessary, and even inappropriate.

The plain meaning of a statute must control absent a clearly expressed legislative intention to the contrary. North Dakota v. United States, 460 U.S. 300, 312 (1983); Garcia v. United States 469 U.S. 70, 75 (1984) (when the terms of a statute are unambiguous, judicial inquiry is complete; "only the most extraordinary showing of contrary intentions would justify a limitation on the 'plain meaning' of the statutory language"); see also, Bourjaily v. United States, ____ U.S. ____, 55 U.S.L.W. 4962, 4964 (1987) ("It would be extraordinary

to require legislative history to confirm the plain meaning of Rule 104 . . . we think that the Rule is sufficiently clear that . . . the rule prevails." (footnote omitted) (emphasis in original)); Rodriguez v. United States, ___ U.S. ___, 55 U.S.L.W. 3641, 3642 (1987) (per curiam) (where "the language of a provision is sufficiently clear in its context and not at odds with the legislative history, '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.'" (citations omitted)); Schiavone v. Fortune, 106 S.Ct. 2379 (1986) (courts must follow "plain language" of Fed.R.Civ.P.15 (c); "accept the Rule as meaning what it says"); cf., Diamond v. Chakrabarty, supra, 447 U.S. at 308

("Unless otherwise defined, words [in a statute] will be interpreted as taking their ordinary, contemporary, common meaning . . .").

Nevertheless, resort to legislative history reveals nothing contrary to the plain language of the rule. Although in 1983 the Advisory Committee "sought to increase the willingness of courts to impose sanctions," (App.A, p. 64a) it did not expand the class of persons against whom sanctions could be imposed from signers to their firms. Indeed, the Advisory Committee considered its 1983 amendment itself a considerable expansion of the equitable doctrines for awarding sanctions. See Fed.R.Civ.P. 11, Advisory Committee Note to 1983 Amendment, 97 F.R.D. 198 (1983). The committee's notes do not suggest that the committee sought

to encourage further judicial expansion of its amendment. Compare, id. at 198-200 and App. A, pp. 63a-64a. The Advisory Committee specifically stated that amended Rule 11 continued to apply "to anyone who signs a pleading, motion or other paper", and advised that "[t]he court is expected to avoid using the wisdom of hindsight and should test the signer's conduct . . ." Id. (emphasis added).¹

Significantly, if the drafters had intended for agency principles to expand

1. The focus of Rule 11 upon an individual attorney's signature has been constant throughout the rule's history. See e.g., United States v. American Surety Co. of N.Y., 25 F.Supp. 225, 226 (E.D.N.Y. 1938).

the category of persons subject to sanctions, there would have been no need to explicitly add clients (the lawyers' principals) to the class of sanctionable persons.¹ (see App. A, p. 63a; 97 F.R.D. at 197).

1. Cf., Russello v. United States 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," quoting, United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)); accord Rodriguez v. United States, supra, 94 L.Ed. 2d at 642. By specifically permitting the sanctioning of non-signing clients, but not of non-signing partners or lawfirms, the drafters apparently made a policy judgment that is not for the courts to alter.

The unambiguous language of Rule 11 does not explicitly or impliedly authorize sanctions against anyone but the signer. The legislative history of Rule 11 is bereft of any expressed legislative intent to vest courts with discretion to impose sanctions on non-signers.

Moreover, because Rule 11, like all rules allowing sanctions, is penal in nature, the court of appeals' expansion of the Rule to permit sanctions against the signer's law firm conflicts with the doctrine that penal statutes should be strictly construed and ambiguities resolved in favor of lenity. Cf., Liparota v. United States, 471 U.S. 419, 426-27 (1985) (citations omitted); United States v. Bass, 404 U.S. 336, 347-48 (1971).

The court of appeals' decision to legislate an expansion of Rule 11 will wreak havoc upon the legal community in the following ways:

(a) It will burden the system with satellite litigation, as feared by the Fifth Circuit Court of Appeals;

(b) It will professionally stigmatize and punish non-litigating lawyers, like Radovan Pavelic, who are faultless except perhaps for their choice of partners;

(c) It will, to the extent it relies upon state law doctrines of agency and partnership, inhibit a uniform nationwide interpretation of a federal rule and

(d) Ironically, it will undermine the effectiveness and purpose of Rule 11 by watering down the heightened

individual professional responsibility called for by the rule.

Manifestly, there is need for an authoritative pronouncement by this Court regarding the applicability of Rule 11 sanctions to non-signers, including the signer's law firm.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

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LAUFER & FARKASH

PATRICIA M. KARISH
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 275, 385—August Term, 1987
(Argued October 28, 1987 Decided August 12, 1988)
Docket Nos. 86-7752, 86-7754, 87-7262

NORTHERN J. CALLOWAY, individually and on behalf of
LMN PRODUCTIONS, INC.,

*Plaintiff-Appellant,
Cross-Appellee,*

—v.—

THE MARVEL ENTERTAINMENT GROUP, a division of
CADENCE INDUSTRIES CORPORATION, JAMES
GALTON, AL BRODAX, MICHAEL S. KLEIN, LUIS
QUIROS, THE SHUKAT COMPANY, LTD., SCOTT
SHUKAT and PETER S. SHUKAT, ESQ.,

Defendants-Appellees,

THE MARVEL ENTERTAINMENT GROUP, a division of
CADENCE INDUSTRIES CORPORATION, JAMES
GALTON and AL BRODAX,

*Defendants-Appellees,
Cross-Appellants.*

THE MARVEL ENTERTAINMENT GROUP, a division of
CADENCE INDUSTRIES CORPORATION, JAMES
GALTON, AL BRODAX, MICHAEL S. KLEIN, LUIS
QUIROS and LMN PRODUCTIONS, INC.,

Third-Party Plaintiffs-Appellees,

—v.—

THE SHUKAT COMPANY, LTD., SCOTT SHUKAT and
PETER S. SHUKAT, ESQ.,

Third-Party Defendants-Appellees,

THE SHUKAT COMPANY, LTD., and SCOTT SHUKAT,

*Third-Party Defendants-Appellees;
Cross-Appellants,*

PAVELIC & LEFLORE (now dissolved),
counsel at trial for plaintiff,

Appellants-Cross-Appellees,

RAY L. LEFLORE, individually and as a partner of
PAVELIC & LEFLORE (now dissolved),

Appellant-Cross-Appellee.

Before:

FEINBERG, *Chief Judge,*
NEWMAN and WINTER, *Circuit Judges.*

Appeal and cross-appeal from a judgment of the United States District Court for the Southern District of New York (Robert W. Sweet, *Judge*) imposing: (i) sanctions of \$100,000 under Rule 11 and \$23,000 under 28 U.S.C. § 1927 (1982) against the plaintiff's attorney and his law firm; and (ii) sanctions of \$100,000 under Rule 11 and \$10,000 under 17 U.S.C. § 505 against the plaintiff. We affirm the imposition of Rule 11 sanctions against the attorney individually on the ground that he failed to make a reasonable investigation before repeatedly putting forward a now admittedly untrue factual claim. We also hold that the district court properly imposed sanctions on the attorney's law firm. We *sua sponte* reinstate the dismissed appeal from Rule 11 sanctions by the now pro se plaintiff, vacate the Rule 11 sanctions imposed against him, and remand for a hearing on whether Rule 11 sanctions should have been imposed on him. The hearing on remand shall also consider the question of whether the attorneys should be jointly and severally liable for sanctions imposed on the plaintiff. We reverse the sanctions imposed against the law firm under 28 U.S.C. § 1927 (1982) for delay in accepting a settlement offer that provided full relief, because the release executed as part of the eventual settlement extinguished the pending motion for sanctions. On appellees' cross-appeal for increased sanctions we remand to determine whether the attorneys should be liable for any sanctions from which the plaintiff is relieved on remand.

WILLIAM PIEL, New York, New York (Robert
J. Katz, Arline Mann, Merle M. Martin,
Sullivan & Cromwell, New York, New

York, of counsel), *for Appellant-Cross-Appellee Ray L. LeFlore.*

RADOVAN PAVELIC, New York, New York,
Pro Se for Appellant-Cross-Appellee Pavelic & LeFlore (now dissolved).

ROBERT B. MCKAY, Santora & McKay, New York, New York, *for Defendants-Appellees, Cross-Appellants The Marvel Entertainment Group, James Galton and Al Brodax.*

NORMAN B. ARNOFF, New York, New York (Linda K. Brockett, Rosilyn, Newman, Arnoff & Siskind, New York, New York, of counsel), *for Third-Party Defendant-Appellee Peter S. Shukat, Esq.*

SOL V. SLOTNIK, Pomerantz & Slotnik, New York, New York, *for Third-Party Defendants-Appellees The Shukat Company, Ltd. and Scott Shukat.*

I. SCOTT BIELER, New York, New York (E. Michael Bradley, Brown & Wood, New York, New York, of counsel), *for Defendant-Appellee Luis Quiros.*

WINTER, Circuit Judge:

This appeal and cross-appeal require us principally to decide whether sanctions of \$200,000 were properly imposed under Rule 11, Fed. R. Civ. P., on an attorney, his firm and his client. We also address the question of whether sanctions may be imposed under 28 U.S.C.

§ 1927 after a case has been settled and dismissed. The sanctioned attorney, Ray L. LeFlore, appeals from Judge Sweet's award of \$50,000 in sanctions against him individually and \$73,000 (\$50,000 under Rule 11, \$23,000 under Section 1927) against his now-dissolved law firm, Pavelic & LeFlore. LeFlore's former law partner, Radovan Pavelic, also appeals the award of \$73,000 in sanctions against Pavelic & LeFlore, arguing that Rule 11 sanctions can be imposed only against the signer of a pleading or paper and not against the signer's firm. Judge Sweet also imposed sanctions against LeFlore's former client and the plaintiff in this case, Northern J. Calloway, of \$100,000 under Rule 11 and \$10,000 under 17 U.S.C. § 505 (1982). Calloway's pro se appeal has been dismissed for failure to prosecute. A cross-appeal seeking to increase the amount of sanctions against LeFlore, his firm and Calloway has been filed by defendants-appellees, cross-appellants The Marvel Entertainment Group ("Marvel"), an animation and motion picture company that is best known for its comic books; James Galton, the president of Marvel; and Al Brodax, a consultant to Marvel (collectively "the Marvel defendants"). Judge Sweet's decisions are reported at 111 F.R.D. 637 (S.D.N.Y. 1986) and 650 F. Supp. 684 (S.D.N.Y. 1986).

OVERVIEW

Because an overview of the underlying litigation is essential to an understanding of the issues, we briefly summarize the proceedings before setting them out in detail. This acrimonious litigation involved scattershot allegations by the plaintiff of copyright infringement, defamation, civil conspiracy, tortious interference, misrepresentation, fraud, breach of fiduciary duty, for-

gery and document tampering. Calloway's action sought \$11 million in compensatory damages and \$33 million in punitive damages from: Calloway's two business partners, Michael S. Klein and Luis Quiros; his theatrical agent, Scott Shukat; his longtime attorney, Peter Shukat; and the Marvel defendants. The core issue was whether the Marvel defendants had infringed Calloway's copyright in a script for a proposed animated science-fiction movie musical, "The Skyrider."

Calloway's case was at all times very weak. A principal vulnerability stemmed from the fact that the original complaint had attached to it as exhibits photocopies of written contracts between Calloway and various defendants. These copies indicated on their face that Calloway had sold all his rights in "The Skyrider" to LMN Productions, Inc. ("LMN") and the authenticity of these copies was not challenged. Because LMN had transferred those rights to the Marvel defendants, their use of Calloway's copyrighted work could not constitute actionable infringement. The original complaint was dismissed on technical grounds, however, and an amended complaint was filed that denied that plaintiff had signed the agreements in question. Specifically, it alleged that Calloway's former attorney, Peter Shukat, had without Calloway's authorization or knowledge, "affixed a facsimile of plaintiff's signature to a series of documents." We will refer to this claim as "the facsimile claim." The facsimile claim was then successfully relied upon by Calloway to defeat a motion for summary judgment. The facsimile claim was, however, abandoned before trial but replaced by two new claims. In these claims Calloway admitted that he had signed the contracts. The first new claim alleged that the contracts had been altered by various means, including white-out, after they were signed. We will refer to this as

"the white-out claim." The second new claim alleged that fraudulent misrepresentations by Peter Shukat caused Calloway to sign the contracts.

After a six-week trial, the jury returned a verdict for the defendants. The successful defense of this litigation cost the defendants over \$900,000. They sought this amount in full in post-trial motions for sanctions against Calloway and his lawyers, LeFlore, who began this action on Calloway's behalf, and the firm of Pavelic & LeFlore, which had been formed in October 1984 and represented Calloway thereafter. Pavelic & LeFlore continued to represent Calloway in defending the motions for sanctions notwithstanding an obvious conflict of interest. Judge Sweet granted the motions in part and imposed sanctions under Rule 11 for the pursuit of the facsimile claim. These amounted to \$50,000 on LeFlore, and \$50,000 on Pavelic & LeFlore. An additional \$23,000 of sanctions was imposed on the firm under 28 U.S.C. § 1927 for failure to accept a settlement offering full relief from Quiros. A separate judgment for sanctions in the amount of \$110,000 was imposed on Calloway. Of this, \$100,000 was imposed under Rule 11 and \$10,000 under 17 U.S.C. § 505, which authorizes an award of fees to a prevailing party in a copyright action. LeFlore and Pavelic appealed, and the Marvel defendants cross-appealed. Calloway filed a pro se appeal, but that appeal was dismissed for lack of prosecution.

We affirm the award of sanctions against LeFlore and his firm. *Sua sponte*, we reinstate Calloway's appeal with regard to Rule 11 sanctions. LeFlore and his firm had a blatant conflict of interest and should have withdrawn as Calloway's counsel in defending the motions for sanctions. Because of this representation, no argument was

made on Calloway's behalf that LeFlore was solely responsible for pursuit of the facsimile claim, notwithstanding considerable evidence supporting that view. Nor was an argument made that even if sanctions should be imposed on Calloway, LeFlore and his firm should be jointly and severally liable for them. We vacate the Rule 11 sanctions against Calloway and remand for a determination of those issues. On remand the district court shall also determine whether, if the sanctions against Calloway are reduced, the lawyers should be liable for those sanctions from which Calloway is relieved. Finally, we reverse the sanctions imposed against Pavelic & LeFlore under 22 U.S.C. § 1927 (1982).

BACKGROUND

1. *The Parties and "The Skyrider" Project*

Because LeFlore takes the astonishing position that he never advanced the facsimile claim, it is necessary to describe the parties and transactions underlying this litigation in what would otherwise be unnecessary detail. The plaintiff, Northern J. Calloway, is an actor best known for his role as David on the children's television program "Sesame Street." In 1979, Calloway became interested in developing a motion picture, "The Skyrider," that would combine animation, science fiction and music. Although Calloway had appeared in several movies, he apparently had no prior experience in film production, animation, merchandising or budgeting. Nor had he ever written a screenplay. Calloway's initial efforts to launch "The Skyrider" project consisted of writing songs in collaboration with a friend, Gavin Spencer, obtaining futuristic drawings from an artist, Sammis McLean, and hiring one David Roth, whom Calloway had met by chance at the

Hayden Planetarium, to compose a brief story outline. Calloway also prepared a rough "presentation book," and, with the assistance of his agent, Scott Shukat, sought unsuccessfully to interest various motion picture companies in the project.

In December 1980, Calloway fortuitously met Luis Quiros, an insurance salesman, in the lobby of a Manhattan office building. Soon thereafter, Quiros introduced Calloway to Michael Klein, a dentist and Quiros's neighbor on Long Island. Although neither Quiros nor Klein had experience in the movie business, the three men sought to interest various investors in financing "The Skyrider." In March 1981 Klein, through a neighbor, arranged to present the project to James Galton and Al Brodax at Marvel. Galton and Brodax expressed some interest in "The Skyrider" but stated that Marvel was not interested in financing a film at an estimated \$5 million cost. Rather, Marvel wanted to use certain of the proposed film's characters in its comic books.

Sometime between June 8, 1981 and August 5, 1981, Calloway, Klein and Quiros formalized their relationship by signing a series of documents. These documents were prepared by Peter Shukat, Calloway's longtime attorney, and Egon Dumler, an attorney who specialized in preparing theatrical agreements. The first document, dated June 8 but executed and notarized on August 5, was a shareholder's agreement for LMN Productions, Inc., a corporation formed to finance and produce the film. The three remaining documents, the option agreement, the writer's agreement, and the music agreement, were all dated June 8. Calloway testified that he signed all four agreements on June 8, while Klein and Quiros maintained that none of them was signed until August 5. Calloway later admitted

that he signed a version of the shareholder's agreement on August 5.

During this period, Calloway was undecided, apparently for tax reasons, whether he would participate in the project as an individual or through a wholly-owned corporation that would provide his services, Netta Productions, Inc. ("Netta"). This uncertainty resulted in the option agreement, writer's agreement and music agreement undergoing several drafts, with some naming Netta as a party and others naming Calloway as a party. Peter Shukat testified that neither he nor Dumler used a word processing machine in preparing these documents. The final version of these agreements thus evidenced the use of "white-out" to make variations concerning Netta and Calloway as well as several typographical errors resulting from the failure to insert "Calloway" or "Writer" in place of "Netta."

The option agreement among LMN, Calloway and Gavin Spencer (who had written some music for the project) granted LMN an option to produce "The Sky rider" upon certain conditions precedent, including the raising of preproduction expenses within seventy-five days and the full production budget within one year thereafter. The option agreement incorporated the writer's agreement and the music agreement. The writer's agreement, which became effective on the exercise by LMN of the option, stated that Calloway, the "Writer," would grant to LMN, the "Producer," all rights to Calloway's services under the agreement and to all writings produced thereunder, including the right to alter such writings. The music agreement among LMN, Calloway and Spencer provided LMN with similar rights to the music for "The Sky rider."

On September 6, 1981, Scott Shukat, Calloway's agent, purporting to act on Calloway's behalf, signed documents extending until September 30, 1981 LMN's right to exercise the option. Calloway later claimed that this extension was invalid because he, Calloway, had signed the original agreements only in his capacity as an officer of Netta, and Scott Shukat had authority to grant such an extension only on Calloway's behalf as an individual, not as a corporate officer. That same month, however, at a meeting attended by Calloway, Klein, Quiros, Galton and Brodax, Marvel agreed in principle with all the parties, including Calloway, to produce "The Sky rider" at a \$5 million budget. Marvel was to have artistic and budgetary control and pay any overage above \$5 million. LMN was still to raise the initial \$5 million.

In September 1981 the sole disagreement among the parties appears to have concerned the amount of computerized animation in the film, an expensive item. 111 F.R.D. at 644. Calloway apparently wanted to spend \$12 million on the film, while Brodax contemplated a \$5 million budget. Nevertheless, Calloway appeared willing to proceed with production of the movie at the \$5 million figure. *Id.*

By mid-September 1981 and as a result of the extension, LMN had been able to raise the front money, although efforts to raise additional funding proved unsuccessful. As a result, Calloway received a check for \$22,500 dated September 21 as his share of the front money, the largest amount he had ever received for his artistic services. The check to Calloway was made out to him personally and not to Netta. He reported it as income on his personal tax return.

In November 1981, Marvel prepared a new presentation book ("Marvel presentation") to assist in raising the \$5 million. This book included Sammis McLean's futuristic drawings, David Roth's story outline, and a five-page introduction and brief conclusion or "bookends" written by Brodax. Klein and Quiros approved the contents of this book on LMN's behalf. It was the Marvel presentation that was alleged to have infringed Calloway's copyright.

A formal agreement between Marvel and LMN was signed on February 1, 1982. Galton signed on behalf of Marvel, and Calloway and Klein signed for LMN. The relationship between Calloway, Klein and Quiros had apparently soured somewhat by that time. Calloway disputed several items in the proposed budget for the film and agreed to sign the Marvel agreement only if it was placed in escrow with Peter Shukat, his attorney, until the disagreements were resolved. On February 9, after Calloway, Klein and Quiros had apparently resolved their differences, Peter Shukat released to Dumler, LMN's attorney, the Marvel agreements. By May, however, the LMN shareholders were again quarreling.

Calloway later claimed that he first saw the Marvel presentation at about this time and was particularly disturbed by the Brodax "bookends," which somewhat altered the story line of "The Sky rider." The Marvel presentation was generally based on Roth's original synopsis except that in the Marvel presentation, the protagonist, Sy Ryder, is a motorman on the 8th Avenue Line, who becomes Sky Rider, a space hero, while playing a video game in his dreary Manhattan apartment. The copyrighted screenplay written by Calloway and Roth, however, omitted "any reference to the worldly-realities of day-to-day existence on the planet Earth," Amended Complaint ¶ 29, while the

Marvel presentation included references to "'cock-roaches,' 'toilet[s] on the BMT,' 'indigestion,' 'mayhem' and 'sludge.'" *Id.* Calloway believed that, as a result, the Marvel presentation demeaned, cheapened and infringed his copyrighted material. It was this molehill of dissatisfaction that led to a mountain of litigation consisting of years of discovery, ten pretrial opinions, a six-week trial, and a record filling six cartons.

2. *The Lawsuit*

In August 1982 Calloway retained attorney Ray LeFlore to bring the suit underlying this appeal. The original complaint, filed in December 1982, and signed by LeFlore, named as defendants Klein, Quiros, Dumler's law firm of Dumler & Giroux, LMN, Peter Shukat, Scott Shukat, the Shukat Company, Ltd. ("SCL"), Marvel, Galton and Brodax. It alleged the willful infringement of Calloway's copyright ("Cause of Action" I), the malicious destruction of the entire value of his copyright (II), unauthorized use of Calloway's name (III), Peter Shukat's intentional breach of his professional obligations as Calloway's attorney (IV), Scott Shukat's and SCL's breach of their fiduciary duties (V), fraud (VI), knowing violation of plaintiff's escrow agreements (VII), and breach of contract (VIII). The complaint sought \$11 million in compensatory damages, punitive damages in an unspecified amount, and costs and attorney's fees.

The original complaint included as exhibits the shareholder's; option, writer's and music agreements. No claim of document tampering, forgery or the use of a facsimile of Calloway's signature on any document was made. Although the exhibits were photocopies, the authenticity of the documents was undisputed, as was the genuineness of the signatures. Calloway's sole claims regarding these

agreements was that LMN had not properly exercised its option in "The Skyrider" within the agreed upon time because Scott Shukat did not have the authority to extend the option on behalf of Netta but only on behalf of Calloway as an individual.

From the very beginning, plaintiff's case suffered from obvious and grave weaknesses. Because "The Skyrider" was never produced, none of the defendants had profited, and most had lost money on the venture. (Calloway appears to have profited to the extent of \$22,500.) The claim that the Marvel presentation had diminished, much less destroyed, the value of Calloway's copyright seemed entirely speculative. The existence of substantial damages was thus in doubt, no matter how powerful the evidence of actionable infringement might be. The liability portion of the case was also flawed, however. The option agreement granted LMN the right to use Calloway's copyrighted script in order to raise funds for the proposed film. The granting clause of the writer's agreement,¹ one of the two

1 The granting clause provided:

Writer hereby grants to Producer, exclusively and perpetually, all now or hereafter existing rights of every kind and character whatsoever, whether or not such rights are now known, recognized or contemplated, and the complete unconditional and unencumbered title throughout the world in and to: Writer's services pursuant to this agreement; any and all results and proceeds thereof; and any and all literary, dramatic and musical material, incidents, plots, dialogue, characters, action, gags, routines, ideas, inventions and other material written, composed, submitted, added, improvised, interpolated and invented by Writer hereunder.

* * *

Producer may add to, subtract from, arrange, rearrange, revise and adapt all such material in any manner, and Writer hereby waives the "moral rights" of authors, as said term is commonly understood. All such material and the world-wide copyright therein (including all renewals and extensions of such copyright) shall auto-

agreements incorporated into the option agreement, transferred to LMN all of Calloway's rights to "The Skyrider," including the right to "revise" the material "in any manner." LMN had in turn transferred those rights to Marvel. Calloway's entire copyright claim rested on the contention that Scott Shukat had authority to act only for Calloway personally, not for the corporation Netta, and that the September extension to LMN was invalid. However, Calloway himself agreed in his testimony that Netta was merely his "alter ego," and he had accepted the \$22,500 check made out to him in his individual capacity after the extension. He reported this sum on his personal income tax return and deducted all business expenses relating to the Skyrider project on that return. Finally, his participation in meetings with Marvel well after the extension and his signing on LMN's behalf of a contract passing the rights to "The Skyrider" to Marvel further undermined his claim that the extension was invalid. Moreover, because Calloway's only federal claim was based on copyright infringement by the Marvel presentation and it was clear that many of the defendants, such as the Shukats, had not participated in or profited from the infringement, subject matter jurisdiction as to them was in doubt.

The copyright issue came to a head when the Marvel defendants moved to dismiss on the ground, *inter alia*, that the agreements attached to the copyright on their face permitted the use of Calloway's copyrighted work, including changes in the plot and characters. Because the Marvel defendants were the only alleged infringers and there was no colorable federal claim against the remaining defen-

atically be and become the property of Producer and Producer shall be deemed to be author thereof, Writer acting entirely as Producer's employee for hire.

dants (who might in any event be unable to satisfy a large judgment), the contracts attached as exhibits to the complaint had become a considerable legal albatross around Calloway's action.

On June 30, 1983, Judge Sweet dismissed the complaint, not on the ground that the agreements authorized the alleged infringement, but on the technical ground that the complaint failed to plead copyright infringement with particularity by neglecting to specify the registration number of the copyright, and the dates and occasions on which the alleged infringement occurred.

An amended complaint, again signed by LeFlore, was filed on August 1, 1983. This complaint alleged that Calloway had "signed and initialed" a series of agreements on June 8, 1982 (§ 44). However, it also stated that "[o]n or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, back-dated to June 8, 1981" that were different from the agreements Calloway had signed and initialed (§ 52), and that "Shukat had no authority whatsoever to purport to affix plaintiff's signature to said documents" (§ 53). This was the original assertion of the facsimile claim. The belated raising of this claim has been explained on the ground that only after LeFlore and Calloway saw the *original* agreements (the exhibits to the first complaint being photocopies), which had been produced in discovery, did they realize that a facsimile of Calloway's signature had been used. The facsimile claim, if believed, was of course a viable response to the Marvel defendants' contention that the agreements attached to Calloway's initial complaint authorized the Marvel presentation. A trier of fact, however, might well raise an eyebrow at the claim that the for-

gery went undiscovered until the original contracts were produced because their provisions were identical to those of the photocopies attached as exhibits to the original complaint.² It should also be noted that the original documents clearly showed the use of white-out in the text (the photocopies were made after the white-out). The amended complaint, however, made no claim involving the alteration of words with white-out.

The amended complaint repeated the host of legal theories against most of those involved in the Sky rider project, sought \$11 million in compensatory damages and specified \$33 million in punitive damages. Notwithstanding the gravely serious allegations of professional and felonious misconduct, however, which we summarize in the margin,³ the gravamen of the complaint was still the federal claim of copyright infringement.

2 The photocopies are identical in every respect to the originals produced by Dumler. The originals produced by Scott Shukat, which were also signed, differ in one respect from the Dumler originals. This difference is that on page 6 of the Shukat original of the Writer's Agreement in the fifth line of the second full paragraph, and the last line of the third full paragraph, the word "Writer" appears where in the Dumler original the word "Netta" appears. The reason for this minute inconsistency is that in the course of a markup intended to substitute Calloway in place of Netta as a party by changing the word "Netta" to "Writer," Dumler inadvertently overlooked two "Nettas" on page 6.

3 The first "cause of action" sought \$11 million in damages from Marvel, Galton, Brodax, Klein and Quiros for infringing Calloway's copyright in "The Sky rider," and "maliciously destroy[ing] and tak[ing] from plaintiff the entire value of his copyright" by showing the Marvel presentation to various persons in the entertainment business.

The second cause of action sought \$3 million in damages, plus \$9 million in punitive damages, for defamation and violation of Calloway's "right to privacy." In essence, this claim was that the allegedly "vulgar references" in and "stereotypical appeal" of the Marvel presentation "irreparably damaged" Calloway's reputation.

(Footnote continued)

On December 22, 1983, Judge Sweet dismissed the amended complaint as to defendants Peter Shukat, Scott Shukat, SCL and Dumler & Giroux for failure to state a

The third cause of action named all of the defendants in a conspiracy to commit copyright infringement and claimed that "at Marvel's behest" Peter Shukat, plaintiff's attorney of ten years, was solicited to assist in the misappropriation of the copyrighted material (§ 51), that Shukat "affixed a facsimile of plaintiff's signature to a series of documents" (§ 52), that Klein, Quiros, Dumler, and the Shukats "together negotiated, drafted and purported to execute on plaintiff's behalf another series of agreements" (§ 54), and that "plaintiff did not know that a series of false and deceptive agreements had been created by defendants." (§ 56).

The fourth cause of action asserted that the "infringements, . . . slander and defamation . . . were knowing, willful and malicious," and sought \$33 million in punitive damages.

The fifth cause of action accused Peter Shukat of "knowingly, violat[ing] his professional obligations to plaintiff and abus[ing] his positions of trust and confidence as plaintiff's own attorney" (§ 72), and sought \$11 million in damages.

The sixth cause of action asserted that SCL and Scott Shukat "knowingly . . . breached their fiduciary duties as plaintiff's managers" (§ 74) and sought \$11 million in damages.

The seventh cause of action was asserted derivatively on LMN's behalf. It admitted that: the June 8, 1981 agreements granted to LMN the rights in "The Sky rider," (§ 76); admitted that LMN had successfully raised the \$75,000 in front money (§ 77); claimed that LMN had "secured both a guarantee of production and a commitment to fund the production of 'THE SKYRIDER,' in separate amounts of at least five million (\$5,000,000) dollars" (§ 77); concluded that the defendants had "unjustifiably interfered with LMN's contractual rights" and "maliciously destroyed" the project's value (§ 78) and sought \$5 million in damages (§ 79). The complaint never stated who gave the \$5 million guarantee of production and \$5 million commitment to fund the production, although earlier in the complaint it was alleged that Marvel had proposed to produce the film at a \$5 million budget (§ 25).

The eighth cause of action accused Klein, Quiros and Dumler & Giroux of breaching their fiduciary obligations to LMN and sought \$5 million in damages.

The ninth and final cause of action accused Klein and Quiros of misappropriating and wasting "substantial funds" of LMN. No dollar amount was provided.

federal claim of copyright infringement. He also dismissed the pendent state claims against those defendants. In doing so, he relied upon the failure of the complaint to allege that Peter Shukat had a financial interest in the infringing activities or that he had supervised, induced or materially contributed either to the production or distribution of the Marvel presentation. With respect to Scott Shukat, the amended complaint alleged in a single paragraph only that he had "directly contributed" to Marvel's creation of the infringing work. Amended Complaint § 58. In an uncontradicted affidavit, however, Scott Shukat stated that he was not aware of the Marvel presentation until June 1982, months after it had been prepared and distributed, and that he did not know Marvel's Galton and had met Marvel's Brodax only once. Calloway never sought discovery or produced any evidence to rebut Scott Shukat's motion, even though the identical defense had been raised to the first complaint. With regard to Dumler & Giroux, Judge Sweet held that a law firm that negotiated agreements between the plaintiff and the alleged infringers could not be a contributory or vicarious infringer. As to the other defendants, Judge Sweet dismissed the third cause of action on the ground that there exists no distinct action for conspiracy under the Copyright Act, and he dismissed the fourth cause of action because punitive damages are not available in statutory copyright-infringement actions.

In a memorandum in opposition to defendants' motions to dismiss the amended complaint that was signed by LeFlore and filed October 19, 1983, LeFlore, *inter alia*, restated paragraphs 49 through 55 of the amended complaint alleging the facsimile claim. The memorandum then stated that: "The allegations quoted above leave no doubt that those documents on which plaintiff had been forced

to rely [in the original complaint] are not the agreements which plaintiff 'signed and initialed' on or about June 8, 1981"

After discovery, the remaining defendants, Marvel, Galton, Brodax, Klein and Quiros, moved for summary judgment on the ground that the June 8, 1981 agreements between Calloway and LMN authorized their use of Calloway's copyrighted work. In a fourteen-page affidavit in opposition that was written by LeFlore and dated April 2, 1984, Calloway stated in Paragraph 6:

I did not refer to, or annex, those documents which, I learned in the interim, had been contrived and forged by defendants. Instead, the Amended Complaint charged:

"52. On or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, backdated to June 8, 1981, purporting to confirm by formal agreement the terms and conditions of a putative option for LMN to acquire 'The Sky rider.' "

The documents referred to above, which I believe Peter Shukat contrived (and others perhaps forged) while he was my attorney and trusted advisor, are: the option agreement, the writers agreement and the composition agreement, all dated June 8, 1981. . . .

Calloway further stated in Paragraph 7 of the affidavit:

Based upon my review of the originals of these three documents, produced in other proceedings, I hereby reaffirm that I neither signed nor approved those agreements. Defendants should not, I submit, be enti-

tled to claim reliance upon documents which I now know were forged and contrived to deceive.

After stating that the defendants should "produce for this Court the agreements I actually 'signed and initialed,' " agreements which, Calloway stated, reserved various rights to him, Calloway asserted that:

Since all copies of the agreements I "signed and initialed" on or about June 8, 1981, were entrusted to Peter Shukat, once a defendant, I cannot now produce such agreements to the Court. I can state, nonetheless, that I never signed or authorized the signing of any "option" agreement in my individual capacity. I only signed such agreements as an officer of Netta Productions, Inc. Nor did I sign any such option in August, 1981.

No reference to the use of white-out or other alteration of the text of the documents was made anywhere in Calloway's affidavit.

Calloway's affidavit mentioned only briefly that Scott Shukat was not authorized to extend the option agreement. The briefs submitted on his behalf, however, made no mention of the issue of Scott Shukat's authority but instead relied upon the facsimile claim. Calloway's memorandum of law opposing summary judgment, also dated April 2 and signed by LeFlore, thus argued that:

The only basis on which defendants could hope to obtain summary judgment in their favor is their claim that plaintiff signed or approved the agreements on which they purport to rely.

Plaintiff's Affidavit, sworn to April 2, 1984, unequivocally attests that he neither signed nor approved the agreements on which defendants purport to rely.

This Affidavit states: [repeats ¶¶ 6-7 of Calloway's Affidavit]. There could be no clearer statement that defendants have nothing authentic on which to rely.

Similarly, Calloway's reply memorandum of May 3, 1984, also signed by LeFlore, stated that:

plaintiff has unequivocally affirmed that the documents on which defendants purport to rely were forged without plaintiff's knowledge or consent. Stated otherwise, defendants can find no support for their motions for summary judgment in rumblings about documents signed by others, a forced construction of language which plaintiff never approved, or any obvious disappointment by them at plaintiff's discovery of the originals of the documents which confirm they were signed by others.

• • •

Once it is shown, as it already has been, that plaintiff did not sign or approve any such document, defendants' only recourse is to claim-over against those individuals who either forged plaintiff's signature or represented they were authorized to sign for him.

If the motion for summary judgment had been granted, of course, the case would have ended. However, Judge Sweet denied the motion for summary judgment on July 3, 1984 because of the statements in Calloway's affidavit regarding the facsimile claim. He stated:

Calloway does not dispute defendants' contention that the terms of the Option Agreement would authorize defendants' acts, but states by affidavit that he never signed or approved the Option Agreement and that Peter Shukat, without Calloway's knowledge,

affixed a facsimile of Calloway's signature to the agreement. Later in his affidavit, however, Calloway states that he "never signed or authorized the signing of any 'option' agreement in my individual capacity. I only signed such agreements as an officer of Netta Productions, Inc. Nor did I sign any such option in August, 1981." Calloway has not explained the inconsistency between these two statements. His having signed the Option Agreement "as an officer of Netta Productions, Inc." appears to be without significance in this context. Calloway annexed the Option Agreement as an exhibit to the original complaint and did not challenge the authenticity of the Option Agreement during earlier motions in this case. He appears to contend that he signed an option agreement on June 8, 1981, in which he reserved the right to make all artistic decisions concerning "The Sky-rider," but that the agreement he signed was altered without his consent, and that he did not discover these alterations until after he filed the complaint.

Judge Sweet then stated that "Calloway has by a narrow margin put sufficient facts in contention to withstand defendants' summary judgment motion." Opinion by Judge Sweet dated July 3, 1984, at 2. However, he warned Calloway and LeFlore that "this court has awarded attorney's fees against a plaintiff who was found after trial to have pursued a claim in bad faith and without factual support" and that "[t]he court will not hesitate to award such costs if the facts are found after trial to warrant such an award." *Id.* at 3.

After the denial of summary judgment, Peter Shukat, Scott Shukat and SCL were brought back into the action after being named third-party defendants by the Marvel

defendants. In denying a motion to dismiss the third-party complaint, Judge Sweet specifically relied upon the fact that its allegations included the claim that Peter Shukat had affixed a facsimile of Calloway's signature to the June 8 agreements. Opinion of Judge Sweet dated January 29, 1985, at 2.

It appears, therefore, that but for the facsimile claim, the case would have been over. Because of that claim, the action continued as to eight defendants. On appeal, LeFlore disputes the conclusion that the facsimile claim was crucial by arguing that Judge Sweet denied the Marvel defendants' motion for summary judgment because of a claim of *post-signature* alterations in the text, the white-out claim, rather than the facsimile claim. However, the facsimile claim was the *only* alteration claim that had been made at the time of the summary judgment motion. The white-out claim was not made until two years later. The facsimile claim alone was thus the basis for Judge Sweet's decision to deny summary judgment, as his later imposition of sanctions expressly stated. See 111 F.R.D. at 647 & n.2.

In October 1984, LeFlore formed the partnership, Pavelic & LeFlore. Thereafter, pertinent papers in the case were signed:

PAVELIC & LEFLORE
By: Ray L. LeFlore (s)
(A Member of the Firm)
Attorneys for Plaintiff

Although LeFlore bore the laboring oar, his partner Radovan Pavelic did participate in various aspects of the case and at least two other lawyers, David Rees Gilliatt and Raymond L. Levites, appeared "of counsel" to Pavelic & LeFlore on Calloway's behalf.

In November 1984, LeFlore for the first time consulted a handwriting and document expert, Pearl Tytell. She not only declined to opine that Calloway's signatures on the contracts were forgeries but instead told LeFlore that they were "possibly" genuine. At trial, she testified that she never considered the signatures to be facsimile signatures.

Throughout the pretrial phase, various defendants sought clarification of the facsimile claim. Peter Shukat's interrogatories thus asked plaintiff to "identify and describe any and all authentic documents that plaintiff relied upon to evidence the forgeries and/or fraudulent alterations." In a response signed by LeFlore and dated April 22, 1985, Calloway, in an apparent but confusing attempt to distinguish between "forgeries" and "affixations of facsimiles," stated that:

Plaintiff has never alleged any forgery of plaintiff's signature, nor is it alleged that any defendant, or defendants, fraudulently altered any document bearing any reasonable relationship to any document plaintiff ever executed on his own behalf or on behalf of Netta Productions, Inc.

Paragraphs 51 through 53 and paragraph 55 of the amended complaint state as follows: [restate ¶¶ 51-53, 55 of amended complaint].

• • •

Until plaintiff is provided discovery of the facts in this action, by oral testimony and further verification of the absence of any basis for authentication by defendant of relevant documents, plaintiff cannot now answer further in this regard, except specifically states that Peter Shukat was then the only person with access to, or ability to provide the other defendants, such facsimiles from the documents actually signed

by plaintiff on or about June 8, 1981, and refers to those documents presently held under seal by the United States District Court, Southern District of New York, which evidence the affixation of a facsimile of plaintiff's signature thereto, and evidence defendants' fraudulent intent in respect thereto.

Answers and Objections of Plaintiff Northern J. Calloway to Defendant Peter Shukat's Interrogatories at 4-5. Moreover, one of Calloway's answers to Luis Quiros's interrogatories, signed by LeFlore and sworn to by Calloway on June 3, 1985, stated that the original documents "evidence the affixation of a facsimile of plaintiff's signature thereto." The answer also asserted once again that "[p]laintiff did not sign such documents."

Calloway's deposition was taken in June 1985. His testimony regarding the facsimile claim was hardly clear, but he did unmistakably state that part of that claim involved the existence of signatures that "imitated" his signatures. He failed, however, to provide an evidentiary basis for that claim. For that basis, Calloway relied upon his inability to recognize his signature, Peter Shukat's possession of the documents after their execution, and, disturbingly, his, Calloway's, belief, that a handwriting expert whom he did not know had informed LeFlore that the contracts bore "improperly affixed facsimile signatures." LeFlore knew at the time of this deposition that Tytell had *not* supported the facsimile claim.

Peter Shukat, who was alleged in the facsimile claim to have committed felonious acts that, if true, would more than justify disbarment, sought unsuccessfully during the pretrial stage to obtain the withdrawal of paragraph 52 of the amended complaint. In a June 21, 1985 letter, his counsel wrote to LeFlore that Rule 11 sanctions would not

be sought for the facsimile claim if it was withdrawn. Similarly, in a July 12, 1985 letter, the same counsel sent an opinion from Paul Osborn, a handwriting expert, to all counsel indicating that Calloway's signatures were in fact genuine.

Notwithstanding the opinions of Tytell and Osborn and the reliance of Calloway on an expert's opinion that was never given, LeFlore persisted in asserting the facsimile claim. Calloway's proposed pretrial order, signed by LeFlore, thus restated the allegation in the amended complaint that Peter Shukat "improperly affixed a facsimile of plaintiff's signature to a series of documents." No reference was made to a white-out claim or any variation thereof. At the final pretrial conference, one week before the start of the trial, counsel for Marvel asked that LeFlore clarify the facsimile claim. He stated:

At different times, Mr. Calloway has said, yes, that's my signature, and other times he has said no, that's not. Mr. LeFlore at times has said, we are claiming forgery, and at other times he has said we are not. They sometimes say, that's a facsimile signature, whatever that means, and at other times they said no.

The district court thereupon explicitly directed LeFlore to "state the document as to which you claim there is an irregularity and what the irregularity is." In a letter amendment to plaintiff's pleadings and contentions submitted by Pavelic & LeFlore on April 1, 1986 and signed by Raymond L. Levites, now LeFlore's co-counsel for trial purposes, Calloway abandoned the facsimile claim by not mentioning it. The letter stated:

The irregularities with reference to the agreements effected by and at the direction of defendant Peter Shukat included physical separation and manipula-

tion of the pages of the agreements to which plaintiff's signature had been affixed, and the alteration of the signature pages after plaintiff had signed them by obliterating one or more words with white-out, by retouching plaintiff's signature, a portion of which had been covered, and the insertion of the signatures of defendant Klein, without plaintiff's knowledge, consent or expectation of any such changes.

Thereafter, Peter Shukat released the June, 1981 agreements without compliance with his undertaking to safeguard them pending Calloway's approval.

Defendant Peter Shukat did all of the foregoing, aided and abetted by the other defendants, both to defraud Calloway and to misappropriate THE SKY-RIDER.

. . .

Plaintiff signed these documents only because defendant Peter Shukat intentionally misrepresented to him that he was obligated to do so and had no choice in the matter.

This letter thus raised for the first time the white-out claim, which asserted that the contracts in question had indeed been signed by Calloway but that the text had been altered by white-out and separation or manipulation of the pages. Because the use of white-out is obvious on the originals, LeFlore and Calloway must have seen the "alterations" at the time of the filing of the amended complaint some two and one-half years before but had never raised them as an issue. In addition, the separation and manipulation of pages, if it happened, occurred before making the photocopies attached to the original complaint but also was never raised. Moreover, the claim that oral misrepresentations by Peter Shukat had caused Calloway to

sign the June 8 agreements had also not been made in the preceding three years and three months of litigation. The letter thus revolutionized Calloway's claims, fully justifying the defendants' view that they had been subject to moving-target litigation.

The case was tried before a jury from April 7, 1986 through May 13, 1986. Eighteen witnesses and about 250 exhibits provided the evidence. In a portion of his deposition read at trial, Calloway stated that he understood the term facsimile signature to mean "a signature placed on one document and then put on to another document" or signatures that "imitate my signatures." On cross-examination, Calloway agreed that he had "no real evidence" other than what LeFlore had told him that Peter Shukat had "forged" his signature or "placed a facsimile signature" on the agreements in question. Calloway was referring to his deposition testimony that LeFlore told him that a handwriting expert had concluded that facsimile signatures had been improperly affixed to the contracts.⁴ In

⁴ His testimony reads as follows:

Q. You have no real evidence to believe that Peter Shukat forged your signature, do you?

A. [Calloway] I have the, I only have the evidence that the—

Q. Please answer the question, yes or no.

MR. LEFLORE: Objection, your Honor.

THE COURT: Overruled.

Q. Yes or no?

A. No.

Q. And you have no real evidence to believe that he placed a facsimile signature of yours on the June 8, 1981 contract documents, do you?

MR. LEFLORE: Your Honor, would you instruct the witness as you did yesterday.

addition, there was substantial evidence that Calloway was mentally ill and had engaged in bizarre behavior unconnected to the litigation.

Although the facsimile claim was not pursued at trial, Calloway did introduce evidence designed to show that Peter Shukat had altered or manipulated the text of the June 8, 1981 agreements with white-out. The purpose of this evidence was to show that the agreements had been signed by Calloway only on behalf of Netta and therefore that Scott Shukat did not have authority to extend the option in September 1981. Central to the case, however,

THE COURT: No.

A. Yes.

Q. And you have no real evidence to believe that he contrived the June, 1981 contract documents.

A. Yes, I do.

Q. You have no real evidence to believe that other than what Mr. LeFlore told you, true?

A. No.

Q. Do you recall giving these sworn answers to these questions in this courthouse on June 13, 19[85] . . .

. . .

"Q. Did a handwriting or document examiner ever confirm to you your claim or contention that the documents attached to Shukat 3 bear improperly affixed facsimile signatures of yours?

"A. Not to me, no.

"Q. To anyone?

"A. Yes.

"Q. Who?

"A. Mr. LeFlore."

. . .

Q. Was that your sworn answers to my questions in this courthouse on June 13, 1985?

A. Yes, they were.

was the eleventh hour claim of oral misrepresentations by Peter Shukat.

At the close of Calloway's case, defendants moved for a directed verdict on all of the claims against them. Despite "serious reservations" about many of the claims, Judge Sweet denied the motion except for the claim that Peter Shukat had fraudulently altered or manipulated the June 8 agreements. As to that claim, he found that "[t]here is no evidence, as far as I am concerned, to show any impropriety or anything that [Shukat] did with respect to those documents that would constitute any kind of a fraud." At the close of their case, the defendants again moved for a directed verdict, and Judge Sweet reserved decision on this motion. At that time, he reiterated that he would "not submit to the jury any claim based on forgery, facsimile, obliteration of documents or alteration of documents because I don't believe that there is any evidence in this record sufficient for that purpose as against any of the defendants."

The jury rendered a verdict rejecting Calloway's claims. This verdict was hardly surprising in light of what Judge Sweet described as "the overall insubstantiality of Calloway's copyright action." 111 F.R.D. at 648. In addition to weaknesses described earlier, there was no evidence that the Marvel presentation was the cause of the failure to obtain financing for the film, the only source of compensatory damages. LeFlore retained an expert on damages only shortly before trial, but the expert's testimony "failed to provide any basis upon which actual damages could be calculated." *Id.* at 644. Indeed, the district court suggested that had the jury returned a verdict in Calloway's favor, no damages would have been allowed. *See id.* at 644-45 ("there never was any factual basis for any spe-

cific damages, nor any objective proof of causation"). Moreover, again to quote the district court, "there was little evidence regarding any intent of the defendants to misappropriate Calloway's copyright." *Id.* at 645. In particular, there was no evidence of a purported conspiracy among Marvel, Galton, Brodax and the Shukats to infringe Calloway's copyright. According to the district court, "[n]o circumstantial evidence was presented to indicate that either of the Shukats sought to engage in joint action with the other defendants. Indeed, the copyright claims against them were dismissed on this basis." *Id.* at 648.

After trial, the defendants sought sanctions from Calloway and LeFlore individually and from LeFlore's firm, Pavelic & LeFlore. Their motions were based on a claim that each of Calloway's allegations, including the facsimile claim, were at all times baseless. Their claim that they had paid in excess of \$900,000 in attorney's fees to defend the litigation was undisputed.

Pavelic & LeFlore continued to represent Calloway in opposing the motions for sanctions, even though some aspects of the motions raised the issue of the relative responsibility of Calloway and LeFlore for conduct, if any, that violated Rule 11. The conflict of interest was of course most aggravated with regard to the facsimile claim, which Calloway had testified was based on his understanding of what a handwriting expert had told LeFlore. Neither Calloway nor LeFlore submitted an affidavit in opposition to the motions for sanctions, leaving all factual issues to be decided on the existing record. The brief submitted by Pavelic & LeFlore (signed by LeFlore) ignored the fact that sanctions were being sought for the facsimile claim, to which a single, oblique reference was made in a

footnote, as well as for other claims. LeFlore's oral argument also ignored the facsimile claim and focused largely on the proposition that sanctions should not be imposed simply because the jury found against Calloway. Of course, the facsimile claim never went to the jury, and this argument was of no relevance as to it.

Judge Sweet issued a lengthy decision on August 1, 1986, see 111 F.R.D. 637 (S.D.N.Y. 1986), in which he denied the Rule 11 motions for sanctions as to every aspect of the case but the facsimile claim.⁵ As to that claim, he imposed \$100,000 in Rule 11 sanctions against Calloway. After noting that Calloway gave testimony that was not consistent with previous statements under oath but that he "may have been unaware of the consequences of his statements," Judge Sweet concluded that "Calloway's inability to give consistent and forthright testimony resulted from his willingness to follow his attorney's advice rather than his own intent to misrepresent the facts." *Id.* at 649-50. Judge Sweet imposed a separate judgment of \$100,000 in Rule 11 sanctions on Pavelic & LeFlore on the ground that the facsimile claim never had a reasonable basis. *Id.* at 651.

Judge Sweet also imposed \$23,000 in sanctions against Pavelic & LeFlore pursuant to 28 U.S.C. § 1927 for failing to accept an offer of settlement from Quiros, *id.* at 649,

⁵ In limiting sanctions to the facsimile claim, Judge Sweet rejected the defendants' argument that Calloway's entire action was frivolous. The defendants, for example, claimed that Calloway's copyright infringement claim was frivolous because of a lack of evidence that Calloway's copyrighted script was used in preparing the Marvel presentation, only that material from the Roth synopsis was used. Judge Sweet determined that this was a nonfrivolous issue of fact because copying from a prior draft of a copyrighted work could be copyright infringement. 111 F.R.D. at 645-46. He also ruled that Calloway's claims regarding the Shukats' misrepresentations and the meaning of the writer's agreement did not call for Rule 11 sanctions. *Id.* at 648.

652, and \$10,000 in sanctions to be paid by Calloway under 17 U.S.C. § 505 of the Copyright Act, which provides that "the court in its discretion may allow the recovery of the full costs by or against the party . . . [including] a reasonable attorney's fee to the prevailing party as part of the costs." *Id.* at 652.

Two weeks later, the firm of Pavelic & LeFlore was dissolved. Radovan Pavelic then made a Fed. R. Civ. P. 60(b) motion to relieve the firm of the various sanctions. At that time, both Pavelic and LeFlore withdrew as counsel for Calloway because they had now discovered that a conflict of interest existed regarding the motions for sanctions. Judge Sweet granted the Rule 60(b) motion in part and allocated the \$100,000 in Rule 11 sanctions equally between the firm and LeFlore, because the firm entered the litigation only in October 1984. See 650 F. Supp. 684, 688 (S.D.N.Y. 1986).

LeFlore sought a stay pending appeal of the judgment awarding sanctions. In support of his motion, he submitted an affidavit that, astonishingly enough, asserted that the facsimile claim had never been made. He thus stated,

While the document tampering allegation developed over time as plaintiff and I were made aware of new evidence, the essence of our position on the authenticity of the agreements was, from beginning to end, not that Calloway's signature was imitated by another person (although Calloway himself sometimes could not identify certain signatures as his) but that the contracts had been altered, manipulated and forged (in the sense of altered) after being signed.

DISCUSSION

1. *The Sanctioned Conduct*

Because LeFlore takes the position that the facsimile claim was never made and that sanctions were imposed only for "document tampering," language that he implies refers only to the white-out claim, we must define with specificity the exact conduct that was the basis for imposing sanctions. In that regard, Judge Sweet stated:

Calloway opposed the summary judgment motion in April, 1984 by claiming that he did not sign the Option Agreement and that it was improperly extended by an extension agreement prepared in September, 1981. . . .

As to the first of these claims, it is now apparent that there was no basis in fact for Calloway's assertions and insufficient inquiry by his counsel. Calloway's statement that he did not sign the Option Agreement inserted into the actions the issues of forgery, manipulation and facsimile signature which created smokescreens during the subsequent two years of discovery. . . .

[T]he basis for Calloway's forgery and facsimile claim should have been known at the time it was originally asserted. It is apparent now that Calloway himself had no basis to make that claim, since he admitted at trial that the evidence regarding this issue was developed by his attorney and not from his personal knowledge of his signature or his actions. Calloway further stated that he was unable to determine for sure whether his signatures were authentic. On the other hand, counsel for Calloway had not yet consulted any expert at the time of the summary judg-

ment motion, and even when an expert was obtained, no material evidence of forgery or facsimile was discovered.

Given the admitted absence of any affirmative evidence from either the signatory o[r] the documents that Calloway's signature was not genuine, it is inconceivable that this allegation could have been made in accordance with the obligations imposed by Rule 11. Instead it appears that in their ambition to maintain this action, Calloway and counsel allowed his inconclusive inability to recognize his signature to be translated into a conclusive denial of his signature. When the central basis for opposing summary judgment is proffered on such an insignificant foundation, Rule 11 sanctions are appropriate.

111 F.R.D. at 646-47 (footnote omitted). Moreover, Judge Sweet explicitly distinguished the white-out claim from the facsimile claim in a footnote:

The other document manipulation claims asserted by Calloway were raised only after it became apparent that forgery or facsimile signature allegations could not be pressed any further. These evolving claims regarding white-outs, additions of another party's signature and alleged removal were so insignificant and immaterial that they were eventually dismissed by the court.

Id. at 647 n.2.

On appeal, LeFlore's counsel continues to play the hand dealt by LeFlore's affidavit supporting the motion for a stay and argues that Calloway never advanced the facsimile claim but asserted only that the text of the documents

was altered by white-out after he signed them. His brief on this appeal thus states:

The District Court's opinion imposing sanctions proceeds as though Calloway's allegation at the time of the summary judgment motion and until shortly before trial had been that his signature had been imitated on the June 1981 Agreements, and that the evidence at trial provided no support for such an allegation. This is simply incorrect. Although Calloway often had trouble recognizing his signature and sometimes denied that certain signatures were his, the position being asserted in court was from beginning to end, as LeFlore has said, that the documents had been altered after Calloway signed them.

Brief for Appellant-Cross-Appellee Ray L. LeFlore at 30-31. Simply put, that statement is incorrect. That LeFlore repeatedly claimed that Calloway's signature had been "imitated" is irrefutably evidenced by the following:

(1) Paragraph 52 of the amended complaint, filed August 31, 1983, alleged that "[o]n or about August 5, 1981 without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, back-dated to June 8, 1981";

(2) LeFlore's memorandum of October 19, 1983 in opposition to a motion to dismiss restated Paragraph 52 of the amended complaint;

(3) Calloway's affidavit in opposition to a motion for summary judgment, written by LeFlore, restated Paragraph 52 of the amended complaint, stated that the documents had been "forged," and further stated that

Calloway had "neither signed nor approved" the documents;

(4) LeFlore's memorandum of law in opposition to the motion for summary judgment stated that Calloway had "neither signed nor approved the agreements";

(5) LeFlore's reply memorandum in opposition to the Marvel defendants' motion for summary judgment stated that the documents "were forged" and "signed by others" and that "defendants' only recourse is to claim-over against those individuals who either forged plaintiff's signature or represented they were authorized to sign for him." These statements cannot be read as anything but challenges to the genuineness of Calloway's signatures.

(6) Calloway's answers to Peter Shukat's interrogatories restated Paragraph 52 of the amended complaint, stated that Peter Shukat had access to "facsimiles from the documents actually signed by plaintiff," and further stated that the original documents provided by defendants "evidence the affixation of a facsimile of plaintiff's signature thereto";

(7) Calloway's answers to Quiros's interrogatories repeated the "evidence the affixation of a facsimile of the plaintiff's signature" and stated that "[p]laintiff did not sign this document."

(8) LeFlore's belated retention of a handwriting expert to examine, *inter alia*, the signatures on the contract is inexplicable unless he was claiming forgery. Moreover, in July, 1985, counsel for Peter Shukat sent LeFlore a letter containing an opinion from another handwriting expert opining that Calloway had signed the agreements and urging that the facsimile claim be withdrawn. If LeFlore was not challenging the genuineness of Calloway's signatures,

a response denying that he was making such a claim was clearly called for. No response was made.

(9) Calloway stated in a deposition that the word facsimile meant that the signatures on the contracts "imitate my signatures" (emphasis added).

(10) Calloway's proposed pretrial order of March 25, 1986 restated the allegations of Paragraph 52 of the amended complaint that Peter Shukat "improperly affixed a facsimile of plaintiff's signature to a series of documents."

The foregoing amply demonstrates that the claim in LeFlore's brief that he never alleged that plaintiff's signature had been "imitated" is as baseless as was the facsimile claim itself.

2. Rule 11 Sanctions and the Facsimile Claim

Rule 11, as amended, requires that "[e]very pleading, motion or other paper of a party represented by an attorney shall be signed" by the attorney. It then provides that:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The 1983 amendment to Rule 11 was intended to "discourage dilatory or abusive tactics and help to streamline

the litigation process by lessening frivolous claims or defenses." Fed. R. Civ. P. 11 advisory committee's note to 1983 amendment. See generally Schwarzer, *Sanctions Under the New Federal Rule 11—a Closer Look*, 104 F.R.D. 181 (1985); Symposium, *Amended Rule 11 of the Federal Rules of Civil Procedure*, 54 Ford. L. Rev. 20 (1985).

We first addressed the meaning of the revised rule in *Eastway Construction Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985) ("*Eastway I*"), cert. denied, 108 S. Ct. 269 (1987), where we held that the new phrase "formed after a reasonable inquiry" imposed an objective test replacing former Rule 11's subjective standard, under which an attorney's "good faith" belief in the "viability" of a pleading or paper provided a "safe harbor" from sanctions. *Id.* at 253. Under the objective standard, district courts should impose sanctions whenever a pleading has been

interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

Id. at 254. In framing this standard, we were concerned lest sanctions stifle creative legal argument and therefore stated that courts should avoid hindsight and resolve all doubts in favor of the signer. *Id.* At the same time, we added that Rule 11 is violated "where it is patently clear that a claim has absolutely no chance of success under the existing precedents. . . ." *Id.*

Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), cert. denied, 108 S. Ct. 1373 (1987), established that Rule 11

applies to all papers filed in a lawsuit and that the signer's conduct should be judged at the time the paper is signed. We held also that Rule 11 does not impose a continuing obligation on the signer to correct or withdraw papers previously filed. *Id.* at 1274-75.⁶ We further noted that Rule 11 sanctions may not be imposed where an attorney has an objectively reasonable basis to pursue a factual claim. *Id.* at 1277.

In considering sanctions regarding a factual claim, the initial focus of the district court should be on whether an objectively reasonable evidentiary basis for the claim was demonstrated in pretrial proceedings or at trial. Where such a basis was shown, no inquiry into the adequacy of the attorney's pre-filing investigation is necessary. If no reasonable evidentiary basis for a factual claim was disclosed in pretrial proceedings or at trial, the district court must then scrutinize the objective reasonableness of the attorney's pre-filing inquiry and the basis for the claim developed by that inquiry. If the inquiry was objectively reasonable under the circumstances and disclosed a reasonable factual basis for the claim, then sanctions are not appropriate. On the other hand, if the attorney either failed to make an objectively reasonable inquiry or pursued a claim for which no basis was disclosed by such an inquiry, then sanctions are appropriate.

We now turn to whether Judge Sweet properly imposed sanctions for the facsimile claim. We review that decision

⁶ Other circuits have decided some of these issues differently. The Fifth Circuit has held that an attorney has a continuing obligation to update papers previously filed. See *Robinson v. Nat'l Cash Register Co.*, 808 F.2d 1119, 1127 (5th Cir. 1987) (citing *Southern Leasing Partners v. McMullan*, 801 F.2d 783, 788 (5th Cir. 1986)), while the Seventh Circuit has ruled that Rule 11 analysis has a subjective component. See *Stabo Food Serv. Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987).

de novo. *Eastway I*, 762 F.2d at 254 n.7 ("Where the only question on appeal becomes whether, in fact, a pleading was groundless, we are in as good a position to determine the answer and, thus, we need not defer to the lower court's opinion."). However, factual findings underlying the imposition of sanctions are reviewed under the clearly erroneous standard. See Fed. R. Civ. P. 52(a).

It is now beyond dispute that the facsimile claim was never supported by any evidence at any stage of the proceeding. Having determined that the facsimile claim on its face was never grounded in fact, we turn to the objective reasonableness of LeFlore's pre-filing inquiry. The Advisory Committee's Note states that

what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading . . . ; or whether he depended on forwarding counsel or another member of the bar.

Fed. R. Civ. P. Rule 11 advisory committee's note to 1983 amendment.

An attorney is entitled to rely on his or her client's statements as to factual claims when those statements are objectively reasonable. In *Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006 (2d Cir. 1986), we reversed the district court's award of sanctions, holding that the attorney's reliance on his client's statements—that the client's employer received federal grants for its work for the military, thereby subjecting the employee to the requirements of the Rehabilitation Act—was reasonable under the circumstances because "the relevant information was largely in the control of defendants." *Id.* at 1012. Moreover, in *Oliveri*, we ruled that an attorney made a

reasonable investigation prior to filing a civil rights suit for an allegedly unconstitutional arrest when he interviewed his client, and obtained and reviewed police and court records. 803 F.2d at 1276-78.

In both *Kamen* and *Oliveri*, the sanctioned attorney submitted an affidavit to the district court recounting the pre-filing inquiry. See *Kamen*, 791 F.2d at 1009; *Oliveri*, 803 F.2d at 1268-69. By contrast, LeFlore never submitted an affidavit to the district court describing a pre-filing inquiry. That fact alone strongly suggests that no inquiry was made.

Nevertheless, given the seriousness of this matter, we take note of the statement by LeFlore's appellate counsel at oral argument that the facsimile claim was based on LeFlore's "interpretation of what his client told him," namely that Calloway told LeFlore that he had not signed the agreements in his personal capacity but only on behalf of Netta.⁷ Even if the statement at oral argument by

⁷ At oral argument, the following colloquy occurred:

NEWMAN, J.: What the complaint says is, on or about August 5, without plaintiff's knowledge, Shukat "improperly affixed a facsimile of plaintiff's signature to a series of documents." That's what it says.

MR. PIEL: That's what it says. An awkward and inept way . . .

NEWMAN, J.: [Can] we establish that's not so?

MR. PIEL: That's what it says, your Honor.

NEWMAN, J.: And is that not so?

MR. PIEL: That is not so.

NEWMAN, J.: It didn't happen.

MR. PIEL: It did not happen.

NEWMAN, J.: But, did the lawyer have any basis for thinking that that had happened, namely the improper affixing of a facsimile of plaintiff's signature to another document?

LeFlore's counsel is treated as a sworn statement by LeFlore, the statement is still no evidence that Calloway told LeFlore that he, Calloway, believed that Peter Shukat had affixed a facsimile of his signature to the relevant documents. Indeed, at trial, Calloway agreed that he never had "real evidence" for the facsimile claim other than *what LeFlore told him*, a reference to his deposition testimony that a handwriting expert had confirmed to LeFlore the improper affixation of a facsimile signature to the contracts. See note 4, *supra*. LeFlore has never disputed this version of events notwithstanding the fact that the expert he hired, contrary to Calloway's belief, did *not* support it.

At oral argument, LeFlore's counsel argued that the attorney-client privilege bars an attorney from raising the defense that he was misled by his client. We need not explore the precise role of the attorney-client privilege in Rule 11 proceedings, however, because Calloway has never sought to invoke it. If LeFlore believed that he had been misled by Calloway, he should have ceased representing him at the start of the Rule 11 proceedings and allowed Calloway to seek the aid of new counsel. Had LeFlore done so, Calloway could have decided whether or not to invoke the privilege, and the issue would have been properly posed. No such steps were taken here. Moreover, LeFlore's claim on this appeal is not that Calloway misled LeFlore but that LeFlore unaccountably created the facsimile claim out of Calloway's statement that he had signed the documents only as an officer of Netta and not

MR. PIEL: That was his interpretation of what [LeFlore's] client told him. And I think that the lawyer is entitled to a presumption that his client told him the same thing that he later told the court and jury under oath, which is that the only agreements I signed were agreements that I signed on behalf of Netta Productions, Inc.

in his personal capacity. That statement is hardly an objectively reasonable basis for the facsimile claim.

The record demonstrates beyond argument LeFlore's indifference to whether the facsimile claim had a factual basis. When the original documents (textually identical to the exhibits to the original complaint) were produced by the defendants, they contained several minor changes involving the obvious use of white-out, which the district court quite properly deemed "insignificant and immaterial." 111 F.R.D. at 647 n.2.⁸ It is conceivable that a reasonable lawyer viewing these documents for the first time would conclude that an inquiry should be made into the alterations. However, nothing on the face of these documents suggests the affixation of a facsimile signature or forgery.

LeFlore did not retain a handwriting or document expert until November 1984, more than one year after he signed the amended complaint and more than six months after writing the affidavit for Calloway stating that the signatures on the agreements were not genuine and filing other papers saying the contracts were "forged" and "signed by others." This expert, Pearl Tytell, compared the original set of documents with several checks bearing five of Calloway's genuine signatures. On the basis of this examination, she told LeFlore that all the agreements were "probably" signed by the same person and "possibly" by

⁸ He further found that these changes were "within the customary practice in such an undertaking." *Id.* at 644. For example, the word "by" next to Calloway's name on the signature page of the writer's agreement was whited-out after he signed this agreement in order to permit the addition of Klein's signature. The word "Writer" was then moved down one line so as to be parallel with Calloway's signature. Similarly, the word "Writer" replaced "Netta" throughout the agreement. The district court found that "[t]he signing of certain documents by Calloway as an officer of Netta was virtually a clerical oversight of inconsequential importance." *Id.*

the signer of the checks. At trial, she testified that she *never* considered the signatures on the June 8 agreements to be facsimile signatures, nor did she know of any evidence that they were not genuine. Calloway's deposition was taken after Tytell had made an oral report to LeFlore. When Calloway stated in that deposition that he was relying upon an expert's opinion to support the facsimile claim, LeFlore knew that no such opinion existed and that the expert actually refuted the claim. Nevertheless, LeFlore declined to drop the claim.

Finally, we note that Calloway's testimony regarding the facsimile claim was inconsistent and sometimes unintelligible and that he may have been mentally ill. These facts hardly justify pursuit of the facsimile claim, however. A reasonable attorney would not pursue a claim of forgery based on such equivocal evidence from such an untrustworthy source. A sensitivity to an attorney's obligation not to press baseless claims would call for caution in such circumstances rather than the headlong and heedless pursuit of a claim of the most serious misconduct by another attorney.

LeFlore's indifference to the existence of a factual basis for the facsimile claim is not cured by Levites's April 1, 1986 letter to the district court abandoning that claim. Under *Oliveri*, the conduct of a signer of a pleading, motion or paper is judged as of the time that the signature is affixed, not later. 803 F.2d at 1274. An attorney cannot be sanctioned therefore for failing to withdraw a claim that later proves to be groundless, provided that the attorney: (i) conducted a reasonable pre-filing inquiry demonstrating a reasonable basis for the claim at the time it was made; (ii) did not subsequently restate the claim after learning that it was groundless; or (iii) did not decline to

withdraw it upon an express request by his or her adversary after learning that it was groundless. However, an attorney who does not undertake such an inquiry cannot avoid Rule 11 sanctions by later withdrawing a groundless claim. By that time, the damage has been done.

We also reject LeFlore's argument that the district court's denial of the Marvel defendants' motions under Rule 56 for summary judgment shield him from the imposition of sanctions. To the contrary, the denial of the motions is one basis for the sanctions. As Judge Sweet noted in imposing sanctions, plaintiff's "central basis for opposing" summary judgment was Calloway's affidavit stating that the documents had been forged by Peter Shukat's affixing a facsimile of Calloway's signature to them. 111 F.R.D. at 647. When he denied the motions for summary judgment on the basis of the facsimile claim as stated in Calloway's affidavit, Judge Sweet warned that sanctions would be imposed if the claim was baseless. *Id.* at 642.

It is hornbook law that a district court "cannot try issues of fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried," and that "[g]iven this function, the district court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists rather than for the purpose of resolving that issue." 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2712, at 574-75, 578 (1983). It is thus entirely possible that a baseless factual claim will survive a motion for summary judgment, particularly where an attorney prepares an affidavit for a client stating a material fact for which there is no basis. Where baseless allegations are used to prevent summary judgment, sanctions are manda-

tory if the attorney did not make a reasonable pre-filing inquiry when he or she originally put forward the claim. Rule 11's purposes would be ill-served by any other rule. See Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630, 635 (1987) ("[B]ecause groundless factual allegations are difficult to uncover prior to trial, there is a danger that a lawyer seeking to extort a settlement might file pleadings based on a fabricated factual dispute. Rule 11 attempts to eliminate this danger by providing for sanctions against lawyers who press bad claims through gaps in other pretrial screening devices.") (footnotes omitted).⁹ Accordingly, pursuit of

⁹ LeFlore also claims that Rule 11 sanctions should not be imposed "when based on one allegation in support of claims that were supported by other independent allegations." For that proposition, LeFlore relies upon *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986). In that case, the district court had imposed sanctions on defense counsel who had made a concededly good faith argument for extension of the law, but had described that argument as if it were existing law. In reversing, the Ninth Circuit held that Rule 11 does not require counsel to engage in such "argument identification." *Id.* at 1539-40. The court further stated in dicta that:

Moreover, Rule 11 does not apply to the mere making of a frivolous argument. The Rule permits the imposition of sanctions only when the 'pleading, motion, or other paper' itself is frivolous, not when one of the arguments in support of a pleading or motion is frivolous. Nothing in the language of the Rule or the Advisory Committee Notes supports the view that the Rule empowers the district court to impose sanctions on lawyers simply because a particular argument or ground for relief contained in a non-frivolous motion is found by the district court to be unjustified. In short, the fact that the court concludes that one argument or sub-argument in support of an otherwise valid motion, pleading, or other paper is unmeritorious does not warrant a finding that the motion or pleading is frivolous or that the Rule has been violated.

Id. at 1540-41.

Golden Eagle, however, dealt with a legal rather than, as here, a factual claim. Moreover, the facsimile claim was no minor sub-claim in an otherwise well-and-independently grounded claim. Cf. *Oliveri*, 803 F.2d at 1280 (sanctions not warranted in civil rights case for "boilerplate" allegations that were not given "serious consideration" by

the facsimile claim justifies the imposition of Rule 11 sanctions.

3. Rule 11 Sanctions Against Calloway

Calloway appeared pro se on his appeal. He asked that we appoint counsel to represent him but failed to file an affidavit of indigency as requested. Because he thereafter filed no papers, his appeal was automatically dismissed by the clerk for failure to prosecute under our Civil Appeals Management Plan. For reasons stated immediately *infra*, we are *sua sponte* recalling the mandate and reinstating Calloway's appeal in order to remand for a determination of the relative responsibility of Calloway and his attorneys for the conduct violating Rule 11 and the allocation of sanctions between them.

The entire Rule 11 proceeding against Calloway was thoroughly tainted by Pavelic & LeFlore's representation of him notwithstanding a self-evident conflict of interest. The motions for sanctions explicitly relied, *inter alia*, upon the facsimile claim. With regard to that claim, Calloway had agreed at trial that he had no "real evidence" other than what LeFlore had told him, namely that a handwriting expert had supported the claim that facsimile signatures were improperly affixed to the contracts. This testimony alone clearly raised an issue as to whether Calloway or LeFlore, or both, were responsible for the conduct Judge Sweet found violative of Rule 11. Unless LeFlore was prepared to inform Judge Sweet that he had in fact

defendants thereby rendering any technical violation of Rule 11 "*de minimis*"). The facsimile claim was in fact "the central basis for opposing summary judgment," 111 F.R.D. at 647, and was an "ill-advised attempt to bolster an otherwise weak case." *Id.* at 648. Moreover, a claim of forgery against a defendant attorney cannot be ignored but must be vigorously defended.

put words in Calloway's mouth in preparing the amended complaint, the affidavit opposing the motions for summary judgment and various answers to interrogatories, and that he thereafter misrepresented to Calloway Tytell's opinion on the matter, he should have ceased to represent Calloway in the Rule 11 proceedings. *See Eastway*, 637 F. Supp. 558, 570 (S.D.N.Y. 1986) (when there is question as to whether client or attorney is at fault, interests of two become adverse and client will need new counsel to represent him). Instead, his firm, from which the defendants were also seeking sanctions, continued to represent Calloway, submitting a brief (signed by LeFlore) devoted almost exclusively to issues that had been submitted to the jury, making only a single, oblique reference to the facsimile claim in a footnote. Of course, no argument was made to the court that LeFlore and the firm bore full responsibility for the facsimile claim. In particular, the extent to which LeFlore pressed the facsimile argument upon Calloway, including a misrepresentation as to an expert's opinion, was not explored. Nor was it argued that, even if Calloway bore some responsibility for the claim, LeFlore and the firm should be jointly and severally liable for sanctions imposed on Calloway.

The district court imposed \$100,000, fifty percent of the total sanctions, upon Calloway, an amount for which the attorneys are not jointly and severally liable. In imposing sanctions, however, Judge Sweet stated that Calloway may not have been aware of the consequences of his statements and was prone to substitute his attorney's theories for the facts. He thus stated that Calloway did not knowingly lie in the affidavit that was written by LeFlore and that Calloway had not acted in bad faith. 111 F.R.D. 649-50. Moreover, the position taken by LeFlore at oral argument in this court is that LeFlore unaccountably

misinterpreted what Calloway told him regarding Calloway's signing only in his capacity as a corporate officer.

In imposing sanctions, Judge Sweet appears to have applied an "objectively reasonable" test to Calloway's conduct. That test, however, is appropriate only in evaluating the conduct of attorneys under Rule 11, not the conduct of parties represented by attorneys. As licensed professionals and officers of the court, attorneys are expected to measure up to minimal standards of professional competence under the Rule and thus may not excuse their conduct on the ground that they were acting in good faith. *Eastway I*, 762 F.2d at 253; *Eastway*, 637 F. Supp. at 566-67.

We believe that a party represented by an attorney should not be sanctioned for papers signed by the attorney unless the party had actual knowledge that filing the paper constituted wrongful conduct, e.g., the paper made false statements or was filed for an improper purpose. The Advisory Committee stated that allocation of sanctions among attorneys and their clients was a matter of judicial "discretion" and that sanctions should be imposed on a party where appropriate under the circumstances. Fed. R. Civ. P. 11 advisory committee's note to 1983 amendment. As guidance, the Committee cited *Browning Debenture Holders Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977), a case holding that a represented party should not be held liable for wrongful conduct by attorneys unless the party was personally aware of or responsible for the conduct.

We believe that where a represented party either did not knowingly authorize or participate in the filing of a paper that violated Rule 11, sanctions against that party are not appropriate. We further believe that when a party has par-

ticipated in the filing of a paper signed by the attorney or has signed a paper himself but did not realize that such participation or signing was wrongful, then sanctions against the party are also not appropriate. In each of these cases, the attorney, because of professional standards, is held to know of the wrongfulness of the conduct and, because of professional responsibility, should act to prevent it. Where the attorney fails to advise an unwary client of the wrongfulness of such conduct, the burden of sanctions should fall entirely upon the attorney. *See Quiros v. Colon*, 800 F.2d 1 (1st Cir. 1986).

Of course, where the party does know that the filing and signing is wrongful and the attorney reasonably should know, then sanctions against both are appropriate. Where a party misleads an attorney as to facts or the purpose of a lawsuit, but the attorney nevertheless had an objectively reasonable basis to sign the papers in question, then sanctions on the party alone are appropriate. *See Friedgood v. Axelrod*, 593 F. Supp. 395 (S.D.N.Y. 1984) (plaintiff lied to attorney).

In the present case, Calloway's signing of the affidavit and answers to interrogatories were seriously wrongful. Judge Sweet, however, appears to have believed that Calloway's contacts with reality were so fragile that he may not have understood that swearing to the facsimile claim was culpable and may have been merely trying to accommodate LeFlore. Indeed, Judge Sweet stated that Calloway did not act in bad faith. 111 F.R.D. at 650. In such circumstances, the imposition of sanctions upon Calloway would be error. Had Calloway pursued his appeal, therefore, it is clear that the judgment against him would at the very least have been remanded. The only question, there-

fore, is whether Calloway's appeal should be reinstated and the mandate recalled. We believe it should.

Were Calloway now to file a motion to reinstate the appeal, we would certainly grant it. *Cf. Avlon v. Greencha Holding Corp.*, 232 F.2d 129 (2d Cir. 1956) (after misunderstanding as to which of several attorneys would handle appeal, motion for leave to file brief granted more than three years after records had been filed). Fed. R. App. P. 2 clearly authorizes us to relieve litigants of the consequences of default "where manifest injustice would otherwise result." Fed. R. Civ. P. 2 advisory committee's notes. The potential of such an injustice clearly exists in the present case, and we believe that the appeal should be reinstated and the judgment against Calloway remanded.

The issue here is not simply the plight of a pro se appellant with a viable claim of error who abandons his or her appeal. The Rule 11 proceeding concerning Calloway was thoroughly tainted by his attorneys' failure to withdraw from representation at the start of the proceeding in which they had an adverse financial interest. *See generally* Code of Professional Responsibility Canon 5, N.Y. Jud. Law Appendix (McKinney 1975). The result was financially disastrous to Calloway and, because Calloway was found to be fifty percent responsible for the conduct violating Rule 11, benefited the attorneys. Because he was represented by attorneys with a clear conflict of interest, Calloway is not only likely to be unaware that he had a viable ground for appeal concerning his responsibility relative to that of LeFlore, but he may also believe that he is protected by LeFlore's appeal. Indeed, LeFlore's brief asks us to reverse the judgment against Calloway on the overstated grounds that the issues regarding the imposition of

sanctions on him are identical to those raised by LeFlore. LeFlore's brief thus states:

Calloway filed with this Court on September 16, 1986 a motion for appointment of counsel and for a stay of proceedings. That motion was denied on May 29, 1987 without prejudice to Calloway submitting an affidavit regarding his inability to retain counsel. Even if Calloway does not submit a brief, a decision by this Court in favor of LeFlore and Pavelic & LeFlore reversing the imposition of sanctions under Rule 11 should apply as well to the \$100,000 Rule 11 sanction which was imposed against Calloway on the same grounds.

Brief for Appellant-Cross-Appellee Ray L. LeFlore at 7 n.1. Calloway and LeFlore may share a common position as to the meritless argument that the facsimile claim was never made and therefore that no sanctions should have been imposed. Otherwise, however, the sanctions imposed on Calloway are based on a finding that he was jointly responsible with his attorneys for pursuit of the facsimile claim, a finding not disputed by LeFlore's appellate brief. Moreover, if LeFlore's counsel believes that LeFlore's appeal protects Calloway, Calloway, being unaware of the conflict of interest, may also believe that LeFlore's appeal is a substitute for his own. The danger of a manifest injustice therefore exists, and we recall the mandate and reinstate Calloway's appeal.¹⁰ On that appeal we vacate the \$100,000 sanctions under Rule 11 and remand for a rede-

¹⁰ We do not reinstate Calloway's appeal regarding the award of attorney's fees under 17 U.S.C. § 505. The conflict of interest did not affect this award since the statute specifically authorizes such an award only against a party, and Calloway's good faith would not be a defense to such sanctions. *Diamond v. Am-Law Publishing Corp.*, 745 F.2d 142, 148 (2d Cir. 1984).

termination of Calloway's responsibility for the facsimile claim under Rule 11 and for other proceedings consistent with this opinion.

4. *Amount of Rule 11 Sanctions and Joint and Several Liability*

To reiterate, the district court imposed Rule 11 sanctions totalling \$50,000 against LeFlore, and \$50,000 against Pavelic & LeFlore. 650 F. Supp. at 688. The district court also imposed separate sanctions of \$100,000 under Rule 11 against Calloway. LeFlore and the firm claim that Judge Sweet abused his discretion in awarding sanctions of this magnitude, while cross-appellants Marvel, Galton and Brodax seek an increase in their award.

As we noted in *Eastway I*, district courts have "broad discretion in fashioning sanctions," 762 F.2d at 254 n.7, and we review such an award under the "abuse of discretion" standard. *Id.* In *Eastway I*, we remanded to the district court the task of imposing "appropriate sanctions," a sum to include "the amount of reasonable expenses incurred by" the defendants. *Id.* at 254. After Judge Weinstein awarded only \$1,000 in sanctions, *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558 (E.D.N.Y. 1986), we modified the award to "the bottom of the range of discretion appropriate to this case" or \$10,000. *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 123 (2d Cir.) ("*Eastway II*"), cert. denied, 108 S. Ct. 269 (1987). In *Eastway II*, we counseled that district courts should "carefully calibrate" the award of sanctions, and "award only that portion of a defendant's attorney's fee thought reasonable to serve the sanctioning purpose of the Rule." *Id.* at 122-23.

In imposing Rule 11 sanctions in the instant case, Judge Sweet considered "the gravity of the Rule 11 violation, the circumstances of the violation within the context of the case, and the financial resources of the respective parties." 111 F.R.D. at 651. He then stated that he

regard[ed] the violation in this case to be a very serious breach of the obligations of an attorney to conduct a reasonable inquiry into the factual circumstances underlying a pleading or a motion, for this case could have been resolved at a much earlier stage if the baseless assertions of forgery and document manipulation had not been made.

Id. After noting that an award of \$900,000, the defendants' aggregate attorney's fees, would be "extremely onerous," Judge Sweet determined that a sanction of \$200,000 to be borne equally by Calloway and Pavelic & LeFlore was appropriate. *Id.* This amount represented approximately the average fee of the five defense counsel. *Id.*

Putting aside for the moment the question of allocating the sanctions among Calloway and his attorneys, we conclude that the total of \$200,000 is not excessive. As we said in *Eastway II*, "[t]he concept of discretion implies that a decision is lawful at any point within the outer limits of the range of choices appropriate to the issue at hand; . . ." 821 F.2d at 123. We entirely agree with Judge Sweet that pursuit of the facsimile claim, which amounted to an utterly baseless charge of forgery against a lawyer, was "a very serious breach" of Rule 11, 111 F.R.D. at 651, and a substantial sanction was appropriate. We cannot say therefore that Judge Sweet abused his discretion in awarding \$200,000, an amount approximating twenty percent of the defendants' attorney's fees of \$900,000. In *Eastway II*,

a reasonable attorney's fee under the lodestar method was \$52,912.50, and we held that "the bottom of the range of discretion" for sanctions was \$10,000. *Id.* at 122-23.

The propriety of the portion of the Rule 11 sanctions imposed on the attorneys, \$100,000, is thus clear. Less clear, however, is the liability of the attorneys for the \$100,000 imposed solely upon Calloway, and we now remand for consideration of that issue. If on remand Judge Sweet decides not to reimpose some or all of the \$100,000 sanctions on Calloway, a question then arises under the cross-appeal as to whether the attorneys should be made liable for the amount from which Calloway is then relieved in light of the fact that a finding of diminished responsibility on Calloway's part appears to imply increased responsibility on the attorneys' part. Even if on remand Calloway remains liable for some or all of the sanctions, we believe a question exists as to the appropriateness of joint and several liability of the attorneys for that amount.

We believe these interrelated questions should be addressed as follows. We now affirm the \$100,000 in sanctions imposed on the attorneys. On the remand that we have ordered in Calloway's reinstated appeal, Judge Sweet, applying the legal standards described above, should determine what portion, if any, of the \$200,000 total sanctions is the responsibility of Calloway and impose either no sanctions on him or an appropriate amount between zero and the \$100,000 originally imposed. If he revises the sanction against Calloway from the \$100,000 originally imposed, he should then consider whether the attorneys should be liable for that portion of the \$100,000 no longer outstanding as to Calloway. We believe this is an issue fairly raised by the Marvel defen-

dants' cross-appeal that seeks, *inter alia*, an increase in the sanctions imposed on the attorneys. The issue must be remanded, however. Judge Sweet's balancing of the numerous pertinent factors has now been undone by our remand of Calloway's appeal, and Judge Sweet should determine in the first instance the appropriate total mix of sanctions (in addition to the \$100,000 affirmed) in the proceedings on remand.

We also remand the issue of the attorneys' joint and several liability for amounts owed by Calloway, if any, after remand. We do so because Judge Sweet gave no reason for entering entirely separate judgments and may have believed that such judgments were required by the district court's decision in *Eastway*. The district court stated there that clients may not reimburse lawyers for Rule 11 sanctions because the possibility of such reimbursement might eliminate the deterrent effect of Rule 11 on attorneys. 637 F. Supp. at 570. Here, however, we face a different situation, for the question whether Calloway may pay the judgment against LeFlore and the firm is not before us. Whether LeFlore and the firm should be jointly and severally liable for sanctions imposed on Calloway, in addition to the separate judgment against them, however, does fairly arise from Calloway's appeal. We believe district courts have discretion to make attorneys jointly and severally liable for sanctions against their clients where the attorneys should have known the conduct at issue violated Rule 11.

In the case of represented clients, the attorney has the principal responsibility for complying with Rule 11 and, where not misled by the client, may properly be jointly and severally liable for the judgment against the client. So long as the attorney was not misled by the client, the attorney's

conduct is a proximate cause of the Rule 11 violation. How sanctions are to be structured, however, is largely a matter of the district court's discretion. We merely stress that it has power to impose joint and several liability on that portion of sanctions resulting from a party's misconduct where the attorney should have known that the misconduct violated Rule 11. We do not reach the question whether a client may be jointly and severally liable for that portion of sanctions resulting from the lawyer's misconduct.

To some extent, the financial resources of the attorneys may be relevant to the remanded questions, and Pavelic and LeFlore should be allowed to supplement the record on that issue notwithstanding their failure to offer such evidence originally. Calloway should also be allowed to make a factual submission in addition to the present record regarding his responsibility for the facsimile claim if he chooses. The attorneys may of course answer that submission.

5. Rule 11 Sanctions Against Pavelic & LeFlore

Having determined that Rule 11 sanctions were properly imposed for pursuit of the facsimile claim, we now consider whether such sanctions can properly be imposed only against LeFlore, the signer of the papers in question, or against his law firm, Pavelic & LeFlore, as well. To reiterate, Judge Sweet originally imposed \$100,000 in Rule 11 sanctions against Pavelic & LeFlore. 111 F.R.D. at 651-52. After a Fed. R. Civ. P. 60(b) motion by LeFlore's partner, Radovan Pavelic, Judge Sweet reallocated the \$100,000 in sanctions, imposing sanctions of \$50,000 on LeFlore individually, and \$50,000 on Pavelic & LeFlore. 650 F. Supp. at 688. Judge Sweet made this reallocation because Pavelic

& LeFlore was formed only in October 1984, the approximate midpoint in the Calloway-Marvel litigation. *Id.*

The text of Rule 11 is silent on whether Rule 11 sanctions may be imposed only against the attorney signing the offending paper or may also be imposed on his or her law firm. It states that every paper shall be signed "by at least one attorney of record in the attorney's individual name"; that "[t]he signature of an attorney . . . constitutes a certificate by the signer that the signer has read the . . . paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry" the paper is "well grounded in fact and is warranted by existing law" or is "a good faith argument" to extend the law. Rule 11 then provides that if a paper "is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction"

In what appears to be the only appellate decision on this question, the Fifth Circuit has held "that an attorney must actually sign a 'pleading, motion, [or] other paper' in order to have sanctions imposed against him." *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1128 (5th Cir. 1987). The district court in *Robinson* had imposed \$4,246.25 in Rule 11 sanctions against the signer of the pleading and papers at issue and against his partner in a two-person law firm. *Id.* at 1121, 1125. The signer's partner had not signed any papers in the case, his only role having been attendance at a pretrial conference. The Fifth Circuit reversed, deeming it irrelevant that the nonsigning partner was a name partner in the law firm and that the firm's name appeared on the papers filed in the suit because "it is the attorney who signs the document, not the firm to which the attorney belongs, that certifies that

the document conforms to the requirements of the rule and accepts the responsibility if it does not." *Id.* at 1132. The decision was based on a perceived need to avoid "satellite litigation over exactly who [in a firm] was responsible for a particular document." *Id.* at 1129. The court apparently assumed that "an inquiry would have to be made of the relative culpability of attorneys who did not sign but who were nevertheless involved with a particular document." *Id.*

Several lower courts, however, have imposed sanctions on law firms on whose behalf an offending paper was signed. See, e.g., *Anschutz Petroleum Marketing Corp. v. E.W. Saybolt & Co.*, 112 F.R.D. 355 (S.D.N.Y. 1986); *Sony Corp. v. S.W.I. Trading, Inc.*, 104 F.R.D. 535, 542 (S.D.N.Y. 1985); *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd on other grounds*, 801 F.2d 1531 (9th Cir. 1986). In *Golden Eagle*, for example, Judge Schwarzer sanctioned the national firm of Kirkland & Ellis for filing a legal memorandum, signed by local counsel but prepared by a Kirkland & Ellis associate, that overstated a legal argument. *Id.* at 125 n.1.

We believe that Rule 11 sanctions should generally be imposed on a signer's law firm as well as on the individual signing an offending paper, although a district court may limit the sanctions to the individual signer where exceptional circumstances exist. Nothing in the language of the Rule prohibits this construction. Although Rule 11 provides for sanctions against the "person who signed" the offending paper, sanctions need not be restricted to individuals because a law firm may be as much the endorser of a paper as the individual attorney who signs it. A law firm is thus typically listed as counsel of record, and papers are

generally signed by an attorney on the firm's behalf. In the instant case, for example, the offending papers (after October 1984) were signed:

PAVELIC & LEFLORE
By: Ray L. LeFlore (s)
(A Member of the Firm)
Attorneys for Plaintiff

Moreover, law firms hold themselves out to clients, to courts and to other counsel as more than mere aggregations of individual practitioners sharing a phone. They create good will through a firm name and use this good will to attract clients, to achieve credibility with judges, and to ease relationships with other counsel. In many cases, clients may hire a particular attorney because of the attorney's affiliation with a certain law firm or a court may designate a lawyer as class counsel based on his or her firm's experience and reputation. Usually, moreover, partners share in the profits of all the work of the firm and also share in the costs.

Where firms are involved, the offending paper may be the joint product of background preparation and drafting by several attorneys. The individual attorney who signs a paper also may not be the one principally responsible for it. In many cases, even in a small firm, more than one lawyer may be involved in preparing a paper or in compiling the legal or factual material contained in it, and the signer of the paper may well be a junior attorney who is simply carrying out the instructions of a senior attorney. While of course we recognize that all attorneys, including the most junior,¹¹ must comply with Rule 11 when they sign an

¹¹ Lack of training or experience is not an issue in this case. LeFlore informed the district court that he had been a member of the law review in law school and had practiced with Sullivan & Cromwell for nine years.

offending paper, limiting sanctions to the signer might encourage the sharp practice of having the most junior (or most impecunious) attorney sign a potentially offending paper.

Certainly, if a partner in a firm instructs an associate to sign a paper, basic agency principles suggest that the firm as principal should bear responsibility. See W. Sell, *Sell on Agency* 81-84 (1975). Under general partnership law, moreover, the partnership as a whole is responsible for the acts of a partner. The New York Partnership Law, while not controlling the interpretation of Rule 11, is nevertheless of guidance. It states that:

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

N.Y. Partnership Law § 24 (McKinney 1948). Nothing persuades us that Rule 11 dispensed with this elementary principle of partnership law. Indeed, the Seventh Circuit has even affirmed the imposition of \$400 in Rule 11 sanctions against the State's Attorney of Cook County under the doctrine of respondeat superior for an infraction by an assistant state's attorney. *Frazier v. Cast*, 771 F.2d 259, 260 (7th Cir. 1985).

The purposes of the 1983 amendment to Rule 11 will also be best served by holding law firms responsible for the acts of their attorneys. That amendment, as noted, was intended to increase deterrence of abusive and dilatory practices. See Fed. R. Civ. P. 11 advisory committee's note to 1983 amendment. The Advisory Committee specif-

ically sought to increase the willingness of courts to impose sanctions and to "build[] upon and expand[]" the existing equitable doctrines for awarding sanctions. *Id.* Firm responsibility for Rule 11 sanctions will create strong incentives for internal monitoring, and greater monitoring will result in improved pre-filing inquiries and fewer baseless claims.

We believe, therefore, that sanctions ought to be imposed on a signer's firm as well as on the signer unless there are exceptional reasons not to do so. Contrary to the belief of the *Robinson* court, this interpretation will not greatly increase the amount of satellite litigation over the imposition of sanctions, because in most cases there will simply be no reason not to include the firm.¹²

Turning to the instant case, Pavelic & LeFlore was a true partnership in the sense that profits and expenses were shared equally by the two partners. Although LeFlore may have done most of the work, the present litigation was handled by the firm as a whole. The firm advanced more than \$60,000 in out-of-pocket expenses in connection with the Calloway litigation. The record shows that other attorneys of counsel to the firm participated in this litigation. One attorney took a portion of Calloway's deposition and another participated in the trial. Moreover, Pavelic himself was no passive observer in the Calloway litigation. He has admitted that he "often discussed" the case with LeFlore, that he attended several depositions and days of trial, and that he insisted that Raymond L. Levites be retained as special counsel for the trial. The firm's role was thus typical rather than exceptional.

¹² We do not reach the question of whether sanctions may be imposed on a law firm that prepares an offending paper but has another firm sign it. See *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984).

Pavelic & LeFlore claim, however, that several facts specific to this case militate against imposing sanctions on the firm. These special circumstances include: (i) Pavelic & LeFlore was not in existence when the facsimile claim was first put forward in the amended complaint; (ii) LeFlore never substituted Pavelic & LeFlore for a prior firm, LeFlore & Eagan, as Calloway's counsel of record; (iii) only the pretrial order was arguably the responsibility of the firm; and (iv) the firm should "get the credit" for abandoning the facsimile claim in its amendment to the pretrial order.

For purposes of imposing sanctions, the district court accepted Pavelic's claim that the firm was "not formally formed" until October 1984, 650 F. Supp. at 686 n.1, and then properly recognized that it could not "be held responsible for papers signed before the firm came into existence." *Id.* at 687. Nevertheless, the firm should be sanctioned for papers signed after formation of the firm that restated the facsimile claim, including answers to interrogatories and the pretrial order. The fact that these simply restated a claim developed prior to the firm's existence does not relieve the firm of its responsibilities under Rule 11, because every offending paper is a basis for sanctions. Moreover, the fact that the firm abandoned the facsimile claim (by not mentioning it) in an amendment to the pretrial order does not cure an earlier violation of Rule 11 because the propriety of a pleading is evaluated as of the time it was signed. See *Oliveri*, 803 F.2d at 1274. We also agree with Judge Sweet that LeFlore's failure to substitute Pavelic & LeFlore as Calloway's attorney of record pursuant to Local Rule 3(c) of the Southern District, see Rules of U.S. Dist. Cts. for the S. and E. Dists. of N.Y., Gen. Rule 3(c), does not prevent the award of sanctions against the firm, 650 F. Supp. at 687 n.2. This is so because it is

undisputed that the firm of Pavelic & LeFlore represented Calloway after October 1984. Exceptional circumstances justifying relief of sanctions on Pavelic & LeFlore are thus notably absent.

We face a more difficult issue in considering the district court's allocation of sanctions between LeFlore and his former law firm. The district court used a chronological yardstick in making this allocation because "[l]ooking back on the four years which this action consumed, it is impossible to allocate to individual pleadings, motions or other papers the reasonable expenses incurred by the defendants in defending against the frivolous allegations." 650 F. Supp. at 688. While a chronological yardstick is not an ideal proxy for making such an allocation, it appears to be as accurate as any other measure available in the circumstances of this case. Although assertion of the facsimile claim to defeat the motion for summary judgment preceded formation of the firm, the interrogatory answers and proposed pretrial order came afterward. Those answers and proposed order, moreover, were filed after Tytell had been retained and had failed to support the facsimile claim.

Finally, we note that on remand the amount of sanctions for which the firm is liable may be increased as a result of our ruling regarding the sanctions imposed on Calloway. There is no injustice in this. The firm continued to represent Calloway in the Rule 11 proceedings in which it had a conflict of interest and profited from doing so. Since the total mix of sanctions is to be reviewed on remand, however, we affirm only the \$50,000 imposed on the firm and, as stated earlier, allow Judge Sweet to determine on remand what additional sanctions, if any, shall be imposed on the firm.

6. *Sanctions Imposed Against Pavelic & LeFlore Under 28 U.S.C. § 1927*

Judge Sweet also imposed \$23,000 in sanctions pursuant to 28 U.S.C. § 1927 (1982) against Pavelic & LeFlore for its delay in accepting a settlement offer from defendant Luis Quiros. 111 F.R.D. at 649, 651. Judge Sweet found that this offer of settlement "provided Calloway with all the relief he could possibly expect to recover from Quiros," *id.* at 649, and that Pavelic & LeFlore had acted in bad faith in delaying acceptance of the offer. 650 F. Supp. at 688.

We briefly set forth the facts relating to the Quiros settlement. Beginning in October 1983, Quiros, who was one of Calloway's partners in LMN, had been represented *pro bono* by the firm of Brown & Wood in the present litigation pursuant to a request by the Southern District Civil Litigation Panel. Because Quiros had obtained a discharge in bankruptcy, the district court granted Quiros's motion to dismiss Calloway's monetary claims. However, it denied a motion to dismiss Calloway's request for injunctive relief against Quiros. Brown & Wood subsequently offered to settle Calloway's outstanding equitable claim by proposing that Quiros would: (i) forbear from any future unauthorized use of Calloway's works, name and business reputation; (ii) subject himself to a civil contempt citation for a breach of the agreement; and (iii) remain available for trial without the need for a subpoena.

LeFlore brusquely rejected this settlement offer in a one-sentence letter from Ilyse J. Wolfe of Pavelic & LeFlore written at LeFlore's request. The letter provided no reasons for the rejection. Brown & Wood then wrote a letter to the district court describing the offer and its unexplained rejection. LeFlore responded in a letter to the

court that the offer "did not afford Calloway the relief he seeks in the action" because the offer did not admit Quiros's liability to Calloway. At a March 17, 1986 pre-trial conference, LeFlore again rebuffed the offer and reiterated his demand for an admission of liability from Quiros. LeFlore noted irrelevantly that any Fed. R. Civ. P. 68 offer of judgment must include costs and statutory attorney's fees. In response to a request from LeFlore, counsel for Quiros made another written offer of settlement. Without responding, LeFlore moved to strike Quiros's offer of settlement on the ground that it did not comply with the procedural requirements of Rule 68. Because the offer did not purport to be made under that Rule, the district court denied the motion. Throughout this period, counsel for Quiros continued, at considerable expense, to prepare for the upcoming trial.

On April 2, 1986, Quiros moved for sanctions against Calloway, LeFlore and Raymond L. Levites pursuant to Section 1927 and Rule 11, alleging that their conduct regarding the settlement negotiations was unreasonable, vexatious, improperly motivated and intended to harass. LeFlore argued in response that sanctions were not proper because Quiros's offers would not provide Calloway with a judgment entered by the court and enforceable as such, and costs and fees.

On April 8, two days into the trial, Judge Sweet told LeFlore "[y]ou do whatever you want," but that "Calloway should consider" that the "possibility" of sanctions existed. The next day, LeFlore entered into a stipulation pursuant to Fed. R. Civ. P. 41(a) which resulted in a dismissal of the action as against Quiros "with prejudice and without costs to each party as against the other." The stipulation also provided that:

without admitting or denying liability, Mr. Quiros hereby agrees to forbear from all future unauthorized use of Mr. Calloway's works and name; breach of said agreement by Mr. Quiros shall be enforceable by a citation for civil contempt upon Mr. Calloway's application to the Court; Mr. Quiros shall promptly return to Mr. Calloway all property relating to the project "Skyrider" still in his custody; subsequent to execution of this Stipulation, Mr. Quiros's deposition testimony given in this action shall, if offered, be received in [as] if he were still a party. . . .

Judge Sweet signed the stipulation. The district court's docket indicates that the stipulation of dismissal was filed on April 10, 1986. Judge Sweet informed the jury that Quiros was "no longer a party to this proceeding" on that date. LeFlore and counsel for Quiros also agreed for the record that "of course all of Mr. Quiros'[s] claims whatever they may be will be dismissed as to counterclaims."

Four months later, on August 1, 1986, the district court granted Quiros's pre-settlement motion for Section 1927 sanctions, awarding \$23,000 against Pavelic & LeFlore because LeFlore "flatly refused [Quiros's settlement] offer without explanation and continued litigation against Quiros until finally accepting the same offer after trial had commenced." 111 F.R.D. at 649.

District courts may not use the threat of sanctions to bring about a particular settlement of a case. *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985). However, in *Kline v. Wolf*, 702 F.2d 400, 405 (2d Cir. 1983), we indicated in dicta that Section 1927 sanctions might be appropriate against an attorney for needlessly and vexatiously multiplying proceedings by rejecting a settlement offer that would afford complete relief.

In this case, we need not reach the merits of the Section 1927 sanctions because we believe that the pending motion for sanctions was extinguished when the case against Quiros was dismissed pursuant to the settlement. The day before the settlement, the district court had warned LeFlore that sanctions pursuant to the pending motion were a "possibility" if the case was not settled. It was in this context that the parties expressly agreed that "this action is dismissed, pursuant to Fed. R. Civ. P. 41(a), as against Mr. Quiros with prejudice and without costs to each party as against the other."

We faced a somewhat analogous problem in *Brown v. General Motors Corporation, Chevrolet Division*, 722 F.2d 1009 (2d Cir. 1983). In that case, the parties agreed to dismissal of plaintiff's civil rights suit "with prejudice and without costs to any party as against the other." *Id.* at 1010. We held that this release executed as part of the settlement barred a subsequent claim for attorney's fees under 28 U.S.C. § 1988 (1982). *Id.* at 1011-12. We interpreted the term "costs" as used in the settlement to include attorney's fees, *id.* at 1012 (citing *Fulps v. City of Springfield*, 715 F.2d 1088 (6th Cir. 1983)), and, alternatively, held that the attorney did not have standing to seek attorney's fees in his own name under Section 1983. *Id.* at 1011.

In the instant case, we believe the parties intended the April 9 stipulation to be a settlement of all of their disputes, including the pending claim for sanctions under Section 1927. Certainly, Pavelic & LeFlore had every reason to expect that the pending motion for sanctions would be extinguished when Quiros was dismissed from the case, particularly since the settlement was evidently a response to Judge Sweet's warning that settlement should be "con-

sider[ed]" in light of the "possibility" of sanctions. Accordingly, we reverse the award of \$23,000 in sanctions against Pavelic & LeFlore under Section 1927. We note, however, that we appreciate the efforts of Brown & Wood as pro bono counsel in this matter.

CONCLUSION

For the foregoing reasons, we affirm the district court's imposition of Rule 11 sanctions against LeFlore and Pavelic & LeFlore. Calloway's appeal from the imposition of Rule 11 sanctions is reinstated *sua sponte*, the \$100,000 sanctions against him are vacated, and the case is remanded for proceedings consistent with this opinion. On the cross-appeal, we remand for further proceedings consistent with this opinion to consider LeFlore's and Pavelic & LeFlore's liability for further sanctions, in the event that sanctions of less than \$100,000 are imposed against Calloway. We reverse the award of sanctions imposed under Section 1927. This panel will hear any further appeal in this matter. Appellants LeFlore and Pavelic & LeFlore will bear all costs, to be shared equally between them, except for the appeal from the imposition of sanctions under Section 1927. No costs will be taxed on that appeal.

APPENDIX B

Northern J. CALLOWAY, individually
and on Behalf of LMN Productions,
Inc., Plaintiff,

v.

The MARVEL ENTERTAINMENT
GROUP, A DIVISION OF CADENCE
INDUSTRIES CORPORATION, James
Galton, Al Brodax, Michael S. Klein,
Luis Quiros, the Shukat Company, Ltd.,
Scott Shukat, Peter S. Shukat, Esq.,
Defendants.

The MARVEL ENTERTAINMENT
GROUP, A DIVISION OF CADENCE
INDUSTRIES CORPORATION, James
Galton, Al Brodax, Michael S. Klein,
Luis Quiros, and LMN Productions, Inc.,
Third Party-Plaintiffs,

v.

The SHUKAT COMPANY, LTD., Scott
Shukat, Peter S. Shukat, Esq.,
Third-Party Defendants.

No. 82 Civ. 8697 (RWS).

United States District Court,
S.D. New York.

Aug. 1, 1986

Pavelic & LeFlore, New York City, for plaintiff; Ray LeFlore, of counsel.

Sheber, Pomerantz & Slotnick, New York City, for third-party defendants Scott Shukat and Shukat Co., Ltd.; Sol v. Slotnik, of counsel.

Brown, Wood, Ivey, Mitchell & Petty, New York City, for defendant Luis Quiros; Stuart J.M. Breslow, of counsel.

Fred E. Scharpf, New York City, for defendants the Marvel Entertainment Group and James Galton.

Arnoff & Merin, P.C., New York City, for third-party defendant Peter Shukat; Norman Arnoff, of counsel.

Brookman & Brookman, P.C., New York City, for defendants Michael Klein and LMN Productions, Inc.; Michael D. Brookman, of counsel.

Santora & McKay, New York City, for defendant Al Brodax; Robert McKay, of counsel.

SWEET, District Judge.

Following a six-week jury trial which a verdict was returned in their favor on each claim brought by the plaintiff Northern J. Calloway ("Calloway"), the defendants Marvel Entertainment Group ("Marvel"), James Galton ("Galton"), Al Brodax ("Brodax"), Michael Klein ("Klein"), The Shukat Company ("SCL"), Scott Shukat and Peter Shukat have brought motions pursuant to Fed.R.Civ.P. 11, 17 U.S.C. §505, 28 U.S.C. § 1927 and the inherent powers of the court to award them costs, expenses and attorney's fees incurred during the defense of this action. Luis Quiros, with whom Calloway settled early in the trial, joins in the

motions of the other defendants and seeks independent relief under Rule 4 and 28 U.S.C. § 1927. The parties have also brought cross-motions regarding the taxation of costs. For the reasons set forth below, the motions will be granted in part and denied in part.

This litigation presented the all-too-familiar bathos from a world of fantasy to that of reality involving a once-in-a-lifetime science fiction movie musical for all ages ("The Skyrider"), the failure of trust among a partnership of short and uncertain standing (LMN Productions) and the difficulties of obtaining financial support for an untried writer and producer (Calloway). As if that were not enough, Calloway, the plaintiff and protagonist, achieved enough fame and success as an actor to lead him to conclude erroneously

that he did not have to stick to his last but could achieve success as a screenwriter and producer.

Further he was afflicted by a diagnosed psychiatric disorder which demonstrably affected his judgment.

These factors placed a heavy burden on Calloway's counsel which he failed to discharge adequately. Most regrettably, these factors became apparent only during and after a trial which was unduly prolonged by the assumption that there was more present than met the eye. The effort to offer Calloway every opportunity to proe his case, as argued by his counsel, was in hindsight mistaken and not in the best interest of any of the parties, as is more fully set forth below.

The Interrelationship of the Parties

Calloway is an actor who has performed in various theatrical and television productions, the most notable being his role as David in the ongoing "Sesame Street" television show. In 1979, when he became interested in creating a science fiction movie, Calloway convinced a gift shop salesman whom he met in that capacity and who had previously sought to write movie scripts to write a synopsis for "The Sky rider." Calloway used this synopsis to write his own script which was copyrighted and then registered in 1982. During this intervening period he had met Klein, a dentist and Luis Quiros, an insurance salesman, in an equally serendipitous fashion, and the three partners sought to promote "The Sky rider" project.

Unknown to the partners, Calloway had a history of mental illness at least since 1980. In September of that year, he severely beat a woman and damaged property while in Tennessee, an incident which resulted in civil litigation and criminal prosecution. Calloway received psychiatric treatment both from a state mental hospital and through a private physician and in 1982 entered a plea of temporary insanity in connection with the Tennessee incident. Prior to the institution of this action, he had been diagnosed as a bipolar manic depressive and received psychotherapeutic and drug treatment for his illness.

Klein and Luis Quiros became shareholders along with Calloway in LMN Productions, Inc., a corporation formed in June 1981 in order to finance the

production of "The Sky rider" as a motion picture.¹ None had any prior experience in such an undertaking nor any prior business relationship with each other. Klein, however, was able to make contact with defendant Marvel, and its executive officer James Galton, who became interested in "The Sky rider." Marvel participated through its employee Brodax in creating a presentation booklet entitled "The Sky rider" to assist in seeking production money. Defendant Scott Shukat was the principal for SCL

1. In August, 1983, Quiros filed a bankruptcy petition pursuant to Chapter 13 and eventually obtained a discharge of all debts including Calloway's copyright claim. See Opinion of February 26, 1986.

which served under contract as Calloway's personal manager and agent during the relevant time period, having performed in that capacity for over seven years. Defendant Peter Shukat was Scott's brother and Calloway's regular attorney, as he had been for over a decade.

Prior Proceedings

Calloway commenced this action of December 2, 1982 and the resulting pretrial proceedings are reflected in the court's opinions of March 17, 1983, June 30, 1983, December 22, 1983, July 3, 1984, October 15, 1984, January 16, 1985, January 29, 1985, August 21, 1985, and February 26, 1986. While familiarity with these opinions is assumed, the most significant aspects of these proceedings can be summarized as follows:

On June 30, 1983, the complaint was dismissed pursuant to Rule 8, Fed.R.Civ.P. for failure to plead the copyright infringement claim with sufficient specificity. The court found that the original complaint failed to specify the dates and occasions on which the alleged infringement occurred and also failed to set forth the registration number of the copyright. Moreover, that opinion noted the ambiguity in the complaint as to whether there were two copyrights on "The Skyrider" and the question as to which one was infringed.

Following service of the amended complaint, the defendants again sought to dismiss. On December 22, 1983, the amended complaint was dismissed as to defendants Peter Shukat, Scott Shukat and The Shukat Company for failure to state

a copyright infringement claim against them. The complaint did not allege that Peter Shukat had a financial interest in the infringing activities or that he supervised, induced or materially contributed either to the infringement or to distribution of the infringing work. As to Scott Shukat, the amended complaint merely contained a single conclusory paragraph stating that he "directly contributed" to Marvel's creation of the infringing work. This, however was specifically refuted by the uncontradicted affidavit of Scott Shukat that he had no knowledge of the infringing work until long after it was prepared and distributed. Thus, the federal copyright claims against each of these defendants was dismissed along with the pendent state law claims. With regard to the other

defendants, the third cause of action for conspiracy to violate the copyright act and the fourth cause of action requesting punitive damages for copyright infringement were dismissed but otherwise the complaint withstood the motions of these defendants to dismiss.

After a period of discovery, the remaining defendants Marvel, Galton, Brodax, Klein and Quiros brought a motion for summary judgment pursuant to Fed.R.Civ.P.56. The defendants' main contention on this motion was that they were authorized to use Calloway's copyrighted work by virtue of several agreements dated June 8, 1981 between Calloway and LMN Productions (the "Option Agreement", "Writer's Agreement" and "Composition Agreement").

In opposing the summary judgment motion, Calloway submitted a fourteen-page affidavit sworn to on April 2, 1984. In that affidavit, Calloway explained that the amended complaint differed from the original complaint by omitting any reference to:

those documents which I learned in the interim, had been contrived and forged by defendants. Instead, the amended complaint charged:

52. On or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, backdated to June 8, 1981, purporting to confirm by formal agreement the terms and conditions of a putative option for LMN to acquire "The Sky rider."

The documents referred to above, which I believe Peter Shukat contrived (and others perhaps forged) while he was my attorney and trusted advisor, are: The option agreement, the writer's agreement and the composition

agreement and the composition agreement, all dated June 8 1981.

...

Although Calloway thus asserted that he had not signed these documents and therefore denied that they constituted an authentic license, he never set forth any basis for this claim. No explanation was proffered regarding the circumstances by which the documents could have been forged or the circumstances which caused Calloway to discover the alleged facsimile and forgery only after the original complaint was filed.

It is appropriate to quote at length from the court's opinion at this critical juncture in the litigation: In denying the defendants' motion for summary judgment the court found that:

Calloway does not dispute defendant's contention that the

terms of the Option Agreement would authorize defendants' acts, but states by affidavit that he never signed or approved the Option Agreement and that Peter Shukat, without Calloway's knowledge, affixed a facsimile of Calloway's signature to the agreement. Later in his affidavit, however, Calloway states that he "never signed or authorized the signing of any 'option' agreement in my individual capacity. I only signed such agreements as an officer of Netta Productions, Inc. Nor did I sign any such option in August, 1981." Calloway has not explained the inconsistency between these two statements. His having signed the Option Agreement "as an officer of Netta Products, Inc." appears to be without significance in this context. Calloway annexed the Option Agreement as an exhibit to the original complaint and did not challenge the authenticity of the Option Agreement during earlier motions in this case. He appears to contend that he signed an option agreement on June 8, 1981, in which he reserved the right to make all artistic decisions concerning "The Sky rider," but that the agreement he signed was altered without his consent, and that he did not discover these alterations until after he filed the complaint.

Calloway has by a narrow margin put sufficient facts in

contention to withstand defendants' summary judgment motion. However, Calloway should be aware that this court has awarded attorney's fees against a plaintiff who was found after trial to have pursued a claim in bad faith and without factual support.

Following the denial of summary judgment, pretrial discovery continued and was marked by such acrimony between the parties that it was necessary to appoint a special master to supervise the concluding phases of discovery. In addition, Peter Shukat, Scott Shukat and SCL were reintroduced into the action as third-party defendants based on the allegations that they altered or executed agreements without Calloway's knowledge or consent and thus should be held liable as third party defendants for any judgment which might be recovered against the alleged copyright infringers. On the eve

of the trial, Calloway moved to reassert his state law claims against Peter Shukat, Scott Shukat and SCL based on pendent jurisdiction. This motion was granted in part to permit the trial of certain misrepresentation claims against these defendants arising out of the same facts upon which the third party claim was based.

Calloway's pretrial order, which was served March 25, 1986, set forth all of the claims still outstanding against the defendants. The pretrial order restated the allegations contained in paragraph 52 of the complaint that Peter Shukat "improperly affixed a facsimile of plaintiff's signature to a series of documents." At the final pretrial conference on March 31, 1986, counsel for Calloway was asked to clarify his client's

claims regarding the alleged document tampering by Peter Shukat. At that time, counsel stated that "[t]he claim is that there are two pages of a document, the signature[s] of which were altered and they were slapped on to another document which the man never saw or signed." At the conclusion of this conference, the court granted defendants' request for a written clarification of the document tampering claim and directed Calloway to submit an amendment to his pretrial order.

An amendment of plaintiff's pleadings and contentions was submitted by letter dated April 1, 1986. In that amendment, Calloway finally specified his claims of document tampering as follows:

The irregularities with reference to the agreements effected by and at the direction

of defendant Peter Shukat included physical separation and manipulation of the pages of the agreements to which plaintiff's signature had been affixed, and the alteration of the signature pages after plaintiff had signed them by obliterating one or more words with whiteout, by retouching plaintiff's signature, a portion of which had been covered, and the insertion of the signature of defendant Klein, without plaintiff's knowledge, consent or expectation of any such changes.

Defendant Peter Shukat did all of the foregoing, aided and abetted by the other defendants, both to defraud Calloway and to misappropriate THE SKYRIDER.

Thus Calloway at this time formally abandoned his prior allegations that Peter Shukat and others had forged or applied a facsimile of his signature to the option agreements.

Trial was commenced on April 7, 1986 by the selection of a jury which had been demanded by Calloway. It continued until May 13, 1986. Eighteen witnesses were

heard, and over 326 exhibits were identified, many of which were admitted.

Calloway was further questioned about the facsimile signature claim during the course of trial. On cross-examination, he stated that he made the claim of facsimile in his amended complaint and that he had never withdrawn such a claim. In deposition testimony read at trial, Calloway stated that by using the word facsimile, he meant that his signature was placed on one document and then put on to another document and this was a facsimile because "[i]n a sense they imitate my signatures" Calloway admitted on cross-examination that he had "no real evidence" that Peter Shukat forged his signature and no real evidence that Peter Shukat contrived the option

agreements other than that which had been developed by his counsel.

At the conclusion of the plaintiff's case, the defendants moved to dismiss each of the claims raised against them. Although expressing serious reservations about many of the issues raised, the court declined to grant the motions with one exception. Calloway's claim of document tampering was dismissed since there was no evidence on which a reasonable jury could conclude that Peter Shukat had fraudulently altered or manipulated the option agreements. The only evidence presented with regard to this issue was some expert testimony which was inclusive and not probative of wrongdoing by Peter Shukat.

After the six-week trial concluded, the jury returned a verdict in favor of

all defendants. In particular, the jury answered the special verdict form in the following manner. First, the jury concluded that Calloway owned the entire copyrighted work including the material written by his associate David Stephen Roth as a work made for hire. Then the jury found that contrary to his testimony Calloway did not direct Scott Shukat not to sign the extension of the option agreements. Therefore, the option agreements were binding between Calloway and the defendants. Finally, the jury interpreted the option agreements to provide the defendants with the right to change or alter Calloway's copyrighted script and thus the use of the copyrighted material by LMN was sanctioned, and the copyright claim was denied. Finally, the jury found that neither Scott nor Peter

Shukat had intentionally misrepresented any material facts to Calloway, contrary to his testimony, and thus the fraud claims were denied.

The present motions were then filed with the permission of the court four weeks after the verdict was rendered, and were fully submitted on July 25, 1986.

The Facts

The facts, of course, were developed before the jury and constituted the foundation upon which its conclusions were reached. However, for the purposes of the issues now presented, it is appropriate that the following abbreviated facts be found.

No divergence of interest was present between the parties over the summer of 1981 when the documents which defined the relationship were prepared by Dumler &

Giroux, a firm specializing in such matters, representing LMN. The execution of the documents, while not performed with the utmost punctilio, was within the customary practice in such an undertaking. The signing of certain documents by Calloway as an officer of Netta was virtually a clerical oversight of insubstantial consequence. Calloway, who rested his alteration claim on this thin base, never offered any credible evidence to demonstrate that his performance as an officer of Netta had any significance.

The only difference between the parties in September, 1981 was a difference between Brodax and Calloway as to the amount of computerized animation to be used in the contemplated production. Brodax, possessed of considerable

experience in the field of animation, wanted as much as could be accommodated within the projected \$5 million budget for production, and Calloway wanted more. Calloway at varying times had a more grandiose view of the budget, believing \$12 million was a more appropriate figure. However, at no time did he express in a meeting with Marvel or in writing an unwillingness to proceed with production of the movie at the \$5 million figure for which Marvel guaranteed to produce the film once the production financing was obtained. Marvel's interest was solely in making the film and using certain of the characters thereafter in comic books and related merchandising.

After the front money was in hand, which produced for Calloway the largest payment he had theretofore ever received

for his work, LMN sought with some help from Marvel to obtain the production financing. The effort was unsuccessful. "The Skyrider" was a naive, confused and conflicted work. Certain of its characters and lyrics, e.g., Chocolate Eclair, were inappropriate and even tasteless. One of its principal characters was "Ssendam," madness spelled backward, whose attributes included, like an actor, an ability to assume many forms and persona. Calloway's belief in the project was revelatory, tragic in some regard, and unwarranted by any objective analysis, at that time or subsequently. After the fall of 1981 Calloway did not participate in any effort to obtain financing.

By early 1982 Calloway became aware of the "bookends" prepared by Brodax for

use in the effort to obtain production funds. The Brodax material offended Calloway and cast "The Skyrider" in a light which he considered inappropriate and contrary to the purpose of the work. Advised by his close friend and later fiancée, who had served as a nonprofessional in a law firm, Calloway sought to obtain legal assistance to obtain redress from his former associates, Klein and Quiros, Marvel, counsel who had prepared the LMN documents, and Peter and Scott Shukat. In December of 1982 this action was brought.

At no time during the trial or during discovery was any evidence adduced to establish that Marvel's alleged infringement was responsible for any failure to obtain financing. The only

damage witness was an expert retained shortly before trial whose testimony failed to provide any basis upon which any actual damages could be calculated. All that was presented therefore was a naked non-economic claim of copyright infringement. Indeed, given the nature of the copyrighted material and the activities conducted, there never was any factual basis for any specific damages, nor any objective proof of causation.

Finally, there was little evidence regarding any intent of the defendants to misappropriate Calloway's copyright. In fact, the most probative indication of Calloway's tendency to imagine tortious conduct by the defendants was evidenced by an agitated discussion which he had with Lionel Barrett in April of 1982 that was later relayed to Peter

Shukat. At that time, Calloway claimed that the reason he was so distraught during the Tennessee incident in 1980 was that he was being poisoned by Klein. Despite this conveyed certainty of mind, in fact, Calloway had not met Klein at the time of the Tennessee incident. All these circumstances placed upon Calloway's counsel a heavy burden to investigate the foundation and details of Calloway's claims.

Discussion

The defendants seek sanctions for the conduct of Calloway and his counsel regarding the claims asserted in this action. The standards for an award of sanctions are well-established, but, of course, it is always a difficult and consuming task to determine whether the

test has been met under the particular circumstances presented by each case.

Rule 11

[1,2] Under Rule 11, ed.R.Civ.P., an attorney must certify that:

he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing laws on a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . .

As our Court of Appeals has explained, it is no longer possible for an attorney to avoid sanctions under Rule 11 merely by espousing a sincere good faith belief in the papers submitted under his signature. Eastway Construction Corp. v. City of New York, 762 F.2d 243, 253

(2d Cir. 1985). Instead, Rule 11 imposes an affirmative obligation on attorneys to scrutinize their own papers to determine whether the pleading is well grounded in fact and in law. The court's task in evaluating a Rule 11 motion is, therefore, to reexamine the pleadings and motions in light of the circumstances at the time they were submitted to determine whether the attorney upheld his obligation. Under the standards required by Rule 11:

[S]anctions shall be imposed against and/or his client when it appears that a pleading has been interposed for any improper purpose or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law on a good faith argument for the extension, modification or reversal of existing law.

Id. at 254 (emphasis in original).

The defendants first urge that Calloway's copyright infringement claim was frivolous because there was no evidence that Calloway's copyrighted script was copied by the defendants. As the evidence at trial established, the allegedly infringing work was created by Marvel at the request of Klein and Quiros to assist in obtaining financing for the project. The Marvel presentation booklet appeared to have been comprised of a copy of "The Skyrider" synopsis created by David Steven Roth, a work which was itself never copyrighted. In addition, the Marvel presentation booklet included "bookends" of material independently created by Brodax with the exception of a single descriptive phrase taken from the copyrighted screenplay.

[3] The defendants incorrectly assert that this conduct could not possibly constitute copyright infringement. While the defendants cite 17 U.S.C. § 103 in support of their argument, this reliance is misplaced. Section 103(b) provides that "[t]he copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material." Based on this limiting language, the defendants contend that Calloway's copyright extends only to the revisions which he made to Roth's synopsis but not to the work of Roth itself. However, given the jury's finding on Question 1 of the special verdict, this

limitation does not apply here. The jury concluded that Roth's synopsis was a work made for hire and thus, in accordance with 17 U.S.C. § 201(b), Calloway as the employer of Roth must be considered the author of that work as of the time it was created. Although the synopsis was not itself copyrighted, the material from the synopsis which was included in Calloway's copyrighted script did obtain copyright protection and was owned exclusively by Calloway as a work for hire. Therefore, the defendants' claim on this issue is reduced to whether the copying of a prior draft of a copyrighted work could constitute copyright infringement. Such an issue presented a question of fact which was not frivolous under the circumstances of this case. Similarly, the defense of fair use would have

required a fact specific balancing of factors which would not have absolutely foreclosed Calloway's claim.

On the other hand with regard to the issue of "unauthorized" use, an element essential to any copyright claim, Calloway had signed the Option Agreement which granted the defendants the right to use his copyrighted script for the purposes of raising financing for the proposed movie. The granting clause of the Writer's Agreement, one of two agreements annexed to the Option Agreement set forth the following transfer of rights from Calloway to LMN:

Writer hereby grants to
 Producer, exclusively and
 perpetually, all now or hereafter
 existing rights of every kind and
 character whatsoever, whether or
 not such rights are now known,
 recognized or contemplated, and the
 complete unconditional and

unencumbered title throughout the world in and to: Writer's services pursuant to this agreement; any and all results and proceeds thereof; and any and all literary, dramatic and musical material, incidents, plots, dialogue, characters, action, gags, routines, ideas, inventions and other material written, composed, submitted, added, improvised, interpolated and invented by Writer hereunder .

... Producer may add to, subtract from, arrange, rearrange, revise and adapt all such material in any manner, and Writer hereby waives the "moral rights" of authors, as said term is commonly understood. All such material and the worldwide copyright therein (including all renewals and extensions of such copyright) shall automatically be and become the property of Producer and Producer shall be deemed to be author thereof, Writer acting entirely as Producer's employee for hire.

Faced with this broad authorization to the defendants, Calloway opposed their summary judgment motion in April, 1984 by claiming that he did not sign the Option Agreements and that it was

improperly extended by an extension agreement prepared in September, 1981. The extension agreement was signed on Calloway's behalf by his agent and attorney-in-fact, Scott Shukat, but Calloway claimed that he had directed both Scott and Peter Shukat not to grant any further extensions.

[4] As to the first of these claims, it is now apparent that there was no basis in fact for Calloway's assertions and insufficient inquiry by his counsel. Calloway's statement that he did not sign the Option Agreement inserted into the action the issues of forgery, manipulation and facsimile signature which created smokescreens during the subsequent two years of discovery. A document examiner was apparently not consulted until six months after Calloway

asserted by affidavit that the documents were not authentic.

This examiner testified at trial that when she was consulted by Calloway's counsel in November 1984, she evaluated the signatures on the Option Agreement and concluded that all of the signatures written above the printed words "Northern J. Calloway" were written by one person. During discovery, the defendants sought to obtain this evaluation by Calloway's document examiner, yet none of the relevant interrogatories were meaningfully answered by the plaintiff. Indeed, by order of July 3, 1985, the court barred any introduction of expert handwriting testimony due to Calloway's failure to provide appropriate discovery, unless good cause was later shown. This order was modified on the eve of trial

to permit Calloway to offer the testimony of his expert witness notwithstanding the previous two years of evading appropriate discovery. At the time of trial, after another examination of the documents, Calloway dropped his claims regarding forgery and facsimile signature and focused instead on various other alleged manipulations.

[5] Therefore, notwithstanding Calloway's sworn statement that he did not sign the Option Agreement, he later considered this claim to be so insubstantial that he did not seek to present it to the jury. The withdrawal of a claim does not in itself require a finding that the claim was originally asserted in violation of Rule 11, since a party may in the course of discovery obtain new facts which reveal the weakness

of an allegation in the complaint. However, in the present case, the basis for Calloway's forgery and facsimile claim should have been known at the time it was originally asserted. It is apparent now that Calloway himself had no basis to make that claim, since he admitted at trial that the evidence regarding this issue was developed by his attorney and not from his personal knowledge of his signature or his actions. Calloway further stated that he was unable to determine for sure whether his signatures were authentic. On the other hand, counsel for Calloway had not yet consulted any expert at the time of the summary judgment motion, and even when an expert was obtained, no material evidence of forgery or facsimile was discovered.

Given the admitted absence of any affirmative evidence from either the signatory on the documents that Calloway's signature was not genuine, it is inconceivable that this allegation could have been made in accordance with the obligations imposed by Rule 11. Instead it appears that in their ambition to maintain this action, Calloway and counsel allowed his inconclusive inability to recognize his signature to be translated into a conclusive denial of his signature. When the central basis for opposing summary judgment is proffered on such an insignificant foundation, Rule 11 sanctions are

appropriate.¹

In addition to claiming that the Option Agreement was not genuine, Calloway also asserted that Peter and Scott Shukat had improperly granted an extension of the Option Agreement without his consent. This claim, along with all the other claimed misrepresentations by Peter and Scott Shukat, involved statements and

1. The other document manipulation claims asserted by Calloway were raised only after it became apparent that forgery or facsimile signature allegations could not be pressed any further. These evolving claims regarding whiteouts, additions of another party's signature and alleged removal were so insignificant and immaterial that they were eventually dismissed by the court.

events between these parties which did not permit independent verification. Thus there is no way to determine whether or not these claims had a reasonable basis in fact.

[6] Nevertheless, it is necessary to realize that these claims against Peter and Scott Shukat would not have established Calloway's claim for copyright infringement. As their principal, Calloway was necessarily responsible for all of the acts of his agents -- Peter and Scott Shukat -- in connection with their representation of him in The Sky rider movie project. Therefore, in addition to establishing that the Shukats committed certain wrongful acts, it would also have been necessary for Calloway to show that the

copyright defendants had knowledge of the Shukats' allegedly unauthorized acts.

To bridge this gap, Calloway's pleadings repeatedly alleged the existence of a conspiracy between all the defendants as well as claims that other defendants aided and abetted the Shukats in their wrongful acts. Thus, by referring collectively to all the defendants Calloway sought to infer that the copyright defendants knew of the Shukats' acts. Again, however, these claims were never substantiated by facts. No circumstantial evidence was presented to indicate that either of the Shukats sought to engage in joint action with the other defendants. Indeed, the copyright claims against them were dismissed on this basis. Scott Shukat's uncontradicted affidavit established

that he was unaware of the allegedly unlawful Marvel presentation until long after the Option Agreement was extended. In closing argument, Calloway's counsel never even suggested that there was evidence on the trial record of such knowledge on the part of the copyright defendants.

[7] Even the final link in Calloway's copyright claim was flawed. Calloway contended at trial that the Option Agreement did not by its terms authorize the defendants to alter or change Calloway's copyrighted script during the option period. In arguing on this point, his counsel stressed that it could not have been the intent of the parties to transfer all of Calloway's rights in the property at the outset of the option period since it was at that time possible

that the movie project might not have raised the necessary financing. Notwithstanding the logic of this position, the plain meaning of the Writer's Agreement contained no such limitations. Instead, the broad language quoted above was a present tense transfer which took effect as soon as the agreement became operative which in turn occurred at the time the \$35,000 in front money was paid. Of course, the court is obligated to apply the plain meaning of a contract without regard to the parole evidence available. Thus, even if the jury had returned a favorable verdict on this issue, it would have been overturned by the court as a matter of law.

To be clear, Calloway's assertions at trial regarding the Shukats' misrepresentations and meaning of the

Writer's Agreement cannot in themselves be considered frivolous contentions that merit Rule 11 sanctions. At the same time, however, they indicate the overall insubstantiality of Calloway's copyright action. Seen in this light, it becomes even more evident that Calloway's baseless assertion of forgery and manipulation of documents was an ill-advised attempt to bolster an otherwise weak case. It was this additional frivolous allegation which prevented analysis of the true merits of Calloway's claim at the time of summary judgment in 1984.

17 U.S.C § 505

The above discussion of whether attorneys' fees may be awarded under Rule 11 is equally applicable with regard to the defendants' motion for sanctions

under 17 U.S.C. § 505. This section of the copyright act provides an independent statutory basis pursuant to which "the court in its discretion may allow the recovery of the full costs by or against any party. . . [including] a reasonable attorney's fee to the prevailing party as part of the costs."

[8-10] Under the law of this Circuit, attorneys' fees are awarded to a prevailing defendant only in exceptional circumstances. See Diamond v. Am-Law Publishing Corp., 745 F.2d 142 (2d Cir. 1984). Such circumstances do not require a finding of subjective bad faith, but rather depend on an objective finding that the plaintiff's allegations were without merit. Given the similarity between the standard for Rule 11 violations and the standard for

exceptional circumstances under §505, an award of attorneys' fees would also be appropriate on this statutory ground. Moreover, this case is analogous to Mailer v. RKO Teleradio Pictures, Inc., 332 F.2d 747 (2d Cir. 1964), where the plaintiff brought a meritless copyright claim in the face of an agreement which had authorized the defendants' actions. In such circumstances where the plaintiff brings suit for a copyright violation despite the existence of an agreement pursuant to which the defendants acted in good faith, the imposition of attorneys' fees does not chill the availability of this federal cause of action for copyright owners who seek to enforce their rights against unauthorized uses.

In addition, the cited authorities suggest that Peter and Scott Shukat should recover attorneys' fees in connection with the copyright actions filed against them in the original complaint. As in Diamond, the copyright allegations were asserted against the Shukats merely as a means of obtaining federal jurisdiction over additional defendants. Where a copyright action is pressed for such a reason, attorneys' fees may be awarded no matter how meritorious are the plaintiff's state law claims. 745 F.2d at 148.

28 U.S.C. §1927

[11] Defendants also seek attorneys' fees pursuant to 28 U.S.C. § 1927 which provides that:

Any attorney or other person admitted to conduct cases in any

court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

While the facts described above and the prior orders of the court suggest that certain of the proceedings were marked by unnecessary and vexatious conduct by Calloway's counsel, prior abuses were corrected at the time they occurred. Moreover, to the extent that the frivolous assertion of document tampering claims resulted in the unreasonable multiplication of the pretrial proceedings, such a violation of an attorney's responsibilities is more appropriately addressed under Rule 11.

Quiros has brought a motion under § 1927 which applies peculiarly to him.

Following the court's opinion of February 26, 1986, which recognized that Quiros' discharge in bankruptcy had extinguished all of Calloway's monetary claims for alleged liabilities owed by him, Quiros made an offer of settlement which provided Calloway with all the relief which he could possibly expect to recover from Quiros. However, counsel for Calloway flatly refused this offer without explanation and continued litigation against Quiros until finally accepting the same offer after trial had commenced.

[12] This motion by Quiros is well founded and indicative of the inexplicably obscure litigating postures adopted by counsel for the plaintiff. Sanctions will be awarded for counsel fees incurred during the delay caused by this resistance. The settlement

agreement between Quiros and Calloway, offered prior to trial, does not prevent sanctions against opposing counsel resulting from vexatious conduct which delayed the execution of the settlement.

Inherent Power of the Court

[13] As stated in Nemeroff v. Abelson, 704 F.2d 652, 654 (2d Cir. 1982): "A prevailing defendant is entitled to an award of attorneys' fees if a plaintiff brings or maintains an action without adequate factual basis and in bad faith." In order to invoke the inherent power of the court, therefore, a finding of bad faith or improper purpose must be reached in addition to the findings set forth above. This court has had some experience with litigation in which the trial record revealed that incorrect versions of the facts were knowingly given by an

interested party. See Schwartz v. Malm, 80 Civ. 6449, slip op. (S.D.N.Y. September 28, 1983) [Available on WESTLAW, DCTU database]. There, after a jury verdict which dismissed the plaintiff's malpractice claim, costs and attorneys' fees were taxed after the court concluded that false testimony had been given in order to create a factual basis for the malpractice claim.

[14] In this case, it has been demonstrated that Calloway's affidavit on the summary judgment motion was set forth without adequate factual basis. There is, however, no direct evidence to indicate that he was aware at the time of his sworn statement that it was untruthful. In fact, Calloway's unusual demeanor as a witness at trial suggests that he may have been unaware of the

consequences of his statements. On numerous occasions during his trial testimony, Calloway displayed an unabashed willingness to testify in a manner directly contradictory to his prior deposition testimony. When confronted with these inconsistencies, Calloway simply replied that he had no explanation. I conclude from these affectless responses that Calloway's inability to give consistent and forthright testimony resulted from his willingness to follow his attorney's advice rather than his own intent to misrepresent the facts. In addition, one must give some consideration to the medical history of Calloway which creates some uncertainty about his capability as a witness. Thus, I conclude that bad

faith on the part of Calloway has not been established.

[15] In addition, it is necessary to consider whether there has been bad faith on the part of Calloway's counsel. Counsel's failure to develop any evidence of joint participation by the copyright defendants in the allegedly unauthorized acts of Calloway's agents and the continuation of the lawsuit after dropping the forgery and facsimile signature claims come very close to establishing bad faith. See Nemeroff, supra, 704 F.2d at 659. However, I conclude that counsel's actions were not motivated by an improper purpose but rather resulted from his difficulty in evaluating and managing the issues raised by this litigation. In particular, despite the allegations of multimillion

dollar damages, counsel failed to make any attempt to establish a foundation for these economic damages until just a few weeks before trial when he first consulted an expert witness regarding the value of movie merchandising rights. Even this expert was not competent to establish whether Calloway's script was likely to be produced and financed. Perhaps the positions taken by counsel were designed to induce a profitable settlement. It is equally possible that the difficulties resulted from a conviction that Calloway's persuasive abilities could convince a jury to return a favorable verdict. Indeed, Calloway's protracted direct examination supports the latter view. On balance, while I conclude that counsel failed to recognize his responsibility to research the factual

basis of the claims thoroughly, to evaluate the extremely limited merits of this action and to assist a pliant client with limited capabilities, I do not believe that counsel's deliberate bad faith has been established.

The Measure of Sanctions

Since it has been concluded that sanctions are appropriate under Rule 11, and alternatively that this was an exceptional case meriting an award of attorneys' fees pursuant to 17 U.S.C. § 505, the amount of sanctions to be awarded must be determined.

This has been a long, arduous and expensive suit. After three and a half years of pretrial proceedings and six weeks of trial, it is no surprise that the legal bills rendered to the defendants and their insurance carriers have been

enormous. According to the affidavits submitted in support of the present motions, the defendants have incurred the following attorneys' fees: Marvel and Galton -- \$297,000; Brodax -- \$221,000; Klein -- \$165,000; Peter Shukat -- \$151,000. Defendants Scott Shukat and SCL have not set forth the legal fees incurred in defense of this action but have indicated that more than \$60,000 were billed for the period between November, 1985 and May, 1986. Defendant Quiros was represented on a pro bono basis. Therefore, in the aggregate, the defendants have been forced to incur approximately \$900,000 in attorneys' fees by reason of this action. Calloway has not contended that these attorney fees are unreasonable.

[16, 17] Under Rule 11, a court is not obligated to grant the full amount of attorneys' fees incurred by the prevailing parties, since such an award is primarily intended to impose a deterrent sanction against the conduct of plaintiff's counsel rather than simply to compensate the defendants for their out-of-pocket losses. See Anschutz Petroleum Marketing Corp. v. E.W. Saybolt & Co., Inc., slip op., 82 Civ. 4498 (S.D.N.Y. April 22, 1986) [Available on

WESTLAW, DCTU database]¹ In determining an appropriate sanction, a court should consider the gravity of the Rule 11 violation, the circumstances of the

1. Similarly, an award of attorneys' fees pursuant to the statutory authority of 17 U.S.C. §505 is "at bottom an equitable matter" which is within the discretion of this court. Faraci v. Hickey-Freeman Co., Inc., 607 F.2d 1025, 1028 (2d Cir. 1979). The award of attorneys' fees pursuant to this alternative holding would be in the same amount as the sanctions awarded under Rule 11 since I conclude, even without supporting affidavits by the plaintiff, that a full award of the defendants' aggregate attorneys' fees would subject Calloway to financial ruin.

violation within the context of the case, and the financial resources of the respective parties. As to this last factor, there is no evidence on the record regarding the financial condition of either Calloway or his counsel. However, I can quickly conclude that an award of the full amount of the attorneys' fees would be extremely onerous for anyone other than a substantial corporation. Furthermore, the Rule 11 violation was limited to only one of several issues raised by the plaintiff and cannot be regarded as causing all of the expenses incurred by defendants. On the other hand, I regard the violation in this case to be a very serious breach of the obligations of an attorney to conduct a reasonable inquiry into the factual circumstances underlying a pleading

motion, for this case could have been resolved at a much earlier stage if the baseless assertions of forgery and document manipulation had not been made. Perhaps this case is a classic demonstration of the desirability of the English practice, toward which Rule 11 seems to be pointing. However, the journey has not yet been completed, and it is necessary under our present practice to assess costs and expense on an other than automatic basis.

[18] I conclude, therefore, that a substantial sanction should be imposed. Under the circumstances set forth above, a sanction of \$200,000 should impose upon the plaintiff and his counsel a sobering realization of the transgressions which have been committed. This amount is also roughly equivalent to the average expense

of each defendant and thus reflects the burden which each was forced to bear without unduly punishing the plaintiff.

I also conclude that the sanctions should be borne equally by Calloway and his counsel. It is, of course, difficult to allocate responsibility for the frivolous assertions made by Calloway and on his behalf by counsel, especially where the plaintiff has a history of mental illness which may have contributed to his lack of restraint in this action. However, it is apparent from the record that Calloway, by his sworn statements, and counsel by his failure to investigate the basis for those statements, each contributed to the violation of Rule 11. Each person failed to uphold his responsibility to set forth accurate facts in opposition to the defendants'

motion for summary judgment, perhaps in the vain hope that the other person had some basis for such assertions. In any case, each will be assessed sanctions of \$100,000. These sanctions will be awarded pro rata to each defendant in proportion to the amount each expended to defend this action, with the exception of Quiros who agreed to settle before the conclusion of trial without costs against Calloway.

[19] In addition, I conclude that Peter and Scott Shukat are each entitled to a reasonable attorneys' fee of \$5,000 for defending against the copyright claims which were dismissed on the pleadings and that counsel for Quiros is entitled to \$23,000 for the vexatious conduct which delayed his settlement.

Cross-Motions Regarding Taxation of Costs

[20] Calloway and the defendants have brought cross-motions pursuant to Rule 54(d) contesting the costs taxed against Calloway by the clerk of the court on June 27, 1986. Calloway asserts that the fees of the Special Master should not be included in the costs because at the time of his appointment the court decided that:

The Special Master will be compensated monthly on an hourly basis at his customary rates and will submit statements to the parties to that end, each party to pay his or its aliquot shares. Upon final resolution of this action, these payments may be subject to a further application for costs.

Master's fees are ordinarily taxable as costs, unless otherwise ordered by the court. Local Rule 11(c)(8). As provided by Local Rule 19(d) which more specifically addresses the taxation of master's fees: "Where, however, the court

directs by order the party against whom, or the proportion in which [a master's] compensation and disbursements shall be charged, . . . the party making payment to the master shall be entitled to tax such compensation or disbursements only against such parties and in such proportions as the court has directed. .

. ." The order which provided for proportionate sharing of the master's fees was never altered following the conclusion of trial or the entry of judgment. In accordance with Local Rule 19(d), this order prevails over the customary taxation of master's fees and therefore the costs will be amended to omit them.

The parties also dispute whether the court reporter fees for "transcript[s] necessarily obtained for use in the case"

where appropriately taxed by the clerk. Peter Shukat claimed such costs in the amount of \$6,979.32 which the clerk reduced to \$5,861.60. Marvel and Galton requested such costs in the amount of \$11,333.20 which were disallowed entirely. The costs attributable to Marvel and Galton were billed in connection with the daily transcripts ordered for two pretrial conferences and the trial. It is unclear for what proceedings Peter Shukat claimed transcription costs.

[21] I conclude that the daily transcripts for the trial and the two conferences were indeed necessary and not merely convenient. See In re Air Crash Disaster, 687 F.2d 626, 632 (2d Cir. 1982). Here, just as in Galella v. Onassis, 487 F.2d 986, 999 n.22 (2d Cir.

1973), the transcripts were needed because "the amounts claimed were large, the trial was of considerable length, and credibility crucial." Therefore, the transcription costs claimed by Marvel and Galton will be granted.

[22] Apparently, Peter Shukat did not order transcripts during the trial but instead shared the transcripts ordered by Marvel and Galton. Thus, lacking any explanation by Peter Shukat, it appears that these costs were connected to pretrial depositions. There is no reason to shift these costs to Calloway and, therefore, the taxed costs will be amended to omit them.

[23] Calloway also challenges the amounts taxed in favor of Peter Shukat and Marvel on the grounds that they are excessive. However, since Calloway

failed to make these objections in writing or at the time of taxation, the clerk had discretion to tax those costs in the amount he considered appropriate. See Local Rule 11(b).

Finally, Calloway's motion to stay the taxation of costs during the pendency of his appeal has been mooted by a lack of prosecution of that appeal resulting in its dismissal.

Conclusion

For the reasons set forth above, the defendants will be granted \$200,000 in attorneys' fees as Rule 11 sanctions. The award will be divided as follows in amounts proportional to the fee statements submitted by counsel for the defendants. Thus, Marvel and Galton will be awarded \$66,000; Brodax, \$49,440; Klein, \$37,000; Peter Shukat, \$33,860;

Scott Shukat and SCL, \$13,700. These amounts will be paid equally by Calloway and his counsel, Pavelic & LeFlore.

Peter Shukat will be awarded \$5,000 and Scott Shukat and SCL will be awarded \$5,000 to be paid by Calloway pursuant to 17 U.S.C. §505. Finally, counsel for Quiros is entitled to \$23,000 from Pavelic & LeFlore as a sanction under 28 U.S.C. §1927.

The clerk is directed to amend the bill of costs to eliminate all requests to tax the special master fees and to eliminate Peter Shukat's request to tax the costs of transcripts. The clerk is directed to award Marvel and Galton their request to tax costs in the amount of \$11,333.20 for the cost of trial and conference transcripts.

IT IS SO ORDERED.

APPENDIX C

Northern J. CALLOWAY, individually
and on Behalf of LMN Productions,
Inc., Plaintiff,

v.

The MARVEL ENTERTAINMENT
GROUP, A DIVISION OF CADENCE
INDUSTRIES CORPORATION, James
Galton, Al Brodax, Michael S. Klein,
Luis Quiros, The Shukat Company, Ltd.,
Scott Shukat, Peter S. Shukat, Esq.,
Defendants.

The MARVEL ENTERTAINMENT
GROUP, A DIVISION OF CADENCE
INDUSTRIES CORPORATION, James
Galton, Al Brodax, Michael S. Klein,
Luis Quiros, and LMN Productions, Inc.
Third Party-Plaintiffs,

v.

The SHUKAT COMPANY, LTD., Scott
Shukat, Peter S. Shukat, Esq.,
Third-Party Defendants.

No. 82 Civ. 8697 (RWS).

United States District Court,
S.D. New York.

Dec. 23 1986

Radovan S. Pavelic, New York City, pro se and for LeFlore.

Ray L. LeFlore, New York City, pro se.

Sheber, Pomerantz & Slotnick, New York City, for third-party defendants Scott Shukat and The Shukat Co., Ltd.; Sol V. Slotnick, of counsel.

Brown, Wood, Ivey, Mitchell & Petty, New York City, for defendant Luis Quiros; Stewart J.M. Breslow, of counsel.

Fred E. Sharf, New York City, for defendants The Marvel Entertainment Group and James Galton.

Arnoff & Merin, P.C., New York City, for third-party defendant Peter Shukat; Norman Arnoff, of counsel.

Brookman & Brookman, P.C., New York City, for defendants Michael Klein and LMN Productions, Inc.; Michael D. Brookman, of counsel.

Santora & McKay, New York City, for defendant Al Brodax; Robert McKay, of Counsel.

SWEET, District Judge.

Radovan S. Pavelic ("Pavelic") has moved pursuant to Fed.R.Civ.P. 60(b) for an order amending this court's opinion of August 1, 1986 and order of September 12, 1986 so as to (1) relieve from and not to impose Rule 11 sanctions against the law firm of "Pavelic & LeFlore," but rather the individual attorney responsible for the signing and signer of the pleadings in question, Ray L. LeFlore, and (2) relieve from and not to impose sanctions pursuant to 28 U.S.C. § 1927 against the firm of "Pavelic & LeFlore," but rather individual counsel, Ray L. LeFlore. For the reasons discussed below, this motion is granted in part and denied in part.

In its August 1 opinion, this court imposed Rule 11 Sanctions against the law firm of Pavelic & LeFlore, based on the finding that allegations of forgery and manipulation of documents set forth in the complaint and subsequent papers had no basis in fact. The individuals who signed these papers were Ray L. LeFlore, Esq. ("LeFlore") and Northern J. Calloway ("Calloway"), the plaintiff in this action. Pavelic signed none of the papers in this action until post-trial motions were made.

The prior proceedings in this action are summarized in this court's opinion of August 1, 1986, 111 F.R.D. 637, 640-43, and will not be repeated here. This action was commenced on December 29, 1982. At that time, the law firm of Pavelic & LeFlore did not yet exist; counsel of

record was the law firm of LeFlore & Egan. Pavelic & LeFlore was formed in October, 1984.¹

Rule 11 states in relevant part:

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least

1. By affidavit, Pavelic states that the firm of Pavelic was "not formally formed" until October, 1984 and that LeFlore did not sign any papers on behalf of Pavelic & LeFlore in this action until December, 1984. LeFlore responds by affidavit that the federal tax returns filed for the partnership for the year 1984 specifically state that such returns for Pavelic & LeFlore are for the period "May 1, 1984 through December 31, 1984." For the purposes of this motion, the date October, 1984 will be used.

one attorney of record in his individual name, whose address shall be stated The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact If a pleading, motion, or other papers is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 11 thus speaks expressly in terms of the attorney who signs a paper "in his individual name," of the "signature" and "knowledge, information and belief" of an attorney, and of "the person who signed [a paper]." See Northern Trust Co. v. Muller, 616 F. Supp. 788, 789 (N.D.Ill.

1985). It does not expressly address the situation at issue here -- whether the court can impose sanctions on a law firm, rather than an individual, as the "person who signed" the paper "in violation of this rule." The law firm is the attorney of record, and it is the law firm on whose behalf the papers are signed.

While New York State Partnership Law does not control in an interpretation of Rule 11, it is instructive on whether a partnership should be held responsible for one partner's acts and omissions. Paragraph 24 of the Partnership Law states:

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is

incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

N.Y. Partnership Law §24 (McKinney 1948).

Although the Second Circuit in Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), discussed Rule 11 in terms of the "signer's conduct," id. at 1274, it was not concerned with the imposition of sanctions on the law firm as "signer" rather than the individual attorney. This court and others, however, have not hesitated to impose sanctions on the law firm on whose behalf a meritless pleading was signed. In Anschutz Petroleum Marketing Corp. v. E.W. Saybolt & Co., 112 F.R.D. 355 (S.D.N.Y. 1986), the Honorable Charles S. Haight imposed Rule 11 sanctions on the law firm as well as the client. Similarly, in Sony Corp v.

S.W.I. Trading, Inc., 104 F.R.D. 535, 542 (S.D.N.Y. 1985), the Honorable David N. Edelstein imposed sanctions on the defendant's law firm for making a frivolous motion to vacate a default judgment. Cf. Multiphase Trading Ltd. v. Weldon F. Stump & Co., No. 84 Civ. 1470 (S.D.N.Y. March 8, 1985) [Available on WESTLAW, DCTU database] (refusing to impose sanctions against the law firm rather than the individual attorney on grounds other than lack of power to sanction the law firm). In Golden Eagle Distributing Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D.Cal. 1984), rev'd on other grounds, 801 F.2d 1531 (9th Cir. 1986), the district court imposed Rule 11 sanctions on the firm of Kirkland & Ellis for the filing of a frivolous motion, even though an associate of the

firm acknowledged responsibility for the preparation of the motion and local counsel signed the papers. In Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985), the Seventh Circuit affirmed the imposition of sanctions on the state attorney under the "respondeat superior" doctrine for an infraction by an assistant state attorney. Id. at 260.

The purpose of the 1983 amendments to Rule 11 was to increase the effectiveness of Rule 11 in deterring abuses by expanding the equitable doctrine permitting the court to award expenses to a litigant whose opponent sets forth frivolous claims and defenses. See Fed.R.Civ.P. 11 Advisory Committee Note. This stated purpose is furthered by including as a "person" who signed a paper the law firm in whose name and on whose

behalf it was signed. The partnership, as counsel of record, should have as much of a stake in certifying the factual and legal basis of a paper as the individual who signs it on the partnership's behalf. Only if the partnership as a whole is held responsible for the acts of its attorneys will the potential of the rule in curbing abuses be fully recognized. Cf. Northern Trust Co. v. Muller, 616 F.Supp. 788, 789 (N.D.Ill. 1985) ("This court need not decide whether, under the realities of law firm practice, any room exists for reading Rule 11 more expansively than its individualized language, so as to extend liability to the firm as well as to the individual signer").

[1,2] In sum, sanctions will be imposed on both the individual attorney

and the law firm on whose behalf he signed the papers. In addition, the amount of attorneys' fees charged to Pavelic & LeFlore must be reduced to take account of the period of time in which the firm of Pavelic & LeFlore was not in existence. During the period from December 29, 1982 to October, 1984, LeFlore signed papers including the complaint, amended complaint, and papers in opposition to a motion for summary judgment. From October, 1984 the date that Pavelic & LeFlore was formed, to the trial date in April, 1986, further papers were signed on behalf of Pavelic & LeFlore, including the pretrial order, served on March 25, 1986. Pavelic & LeFlore cannot be held responsible for papers signed before the firm came into existence. In Oliveri, the Second Circuit held that the

application of Rule 11 is limited to testing the attorney's conduct at the time the paper is signed. See Oliveri, supra, 803 F.2d at 1274-75. Since there is no continuing obligation on the part of the attorney to withdraw a paper asserting a claim that later proves to be groundless, Pavelic & LeFlore cannot be held responsible for pleadings signed prior to October, 1984.¹

Looking back on the four years which this action consumed, it is impossible

1. Pavelic's claim that Pavelic & LeFlore was never formally substituted as counsel and therefore cannot be subject to sanctions is without merit. It is undisputed that the firm was representing Calloway from October, 1984 through the end of trial.

to allocate to individual pleadings, motions or other papers the reasonable expenses incurred by the defendants in defending against the frivolous allegations. Instead, it is appropriate to allocate the \$100,000 in sanctions on the basis of the fraction of the four years in which Pavelic & LeFlore was in existence. Since this action consumed twenty-one months before the creation of Pavelic & LeFlore in October, 1984, and twenty months until the end of trial in May, 1984, this court shall impose sanctions of \$50,000 on Ray L. LeFlore individually, and \$50,000 on Ray L. LeFlore and Pavelic & LeFlore, jointly and severally.

[3] Pavelic also challenges the imposition of sanctions pursuant to 28 U.S.C. § 1927 against the firm of "Pavelic

& LeFlore" for refusing an offer of settlement from defendant Luis Quiros ("Quiros"), following the court's opinion of February 26, 1986, that would have provided Calloway with all the relief he could possibly expect to recover from Quiros, who had been discharged in bankruptcy. To impose a sanction under 28 U.S.C. § 1927 requires a "clear showing of bad faith" on the part of the attorney. Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1010 (2d Cir. 1986). Although this court's opinion of August 1 did not explicitly state that Pavelic & LeFlore was acting in bad faith, the circumstances surrounding the rejection of the settlement offer at that time, including the failure to explain the refusal of the offer, demonstrate bad faith.

[4] Pavelic also argues that Quiros has waived his right to request sanctions under 28 U.S.C. § 1927. After trial had commenced, Pavelic & LeFlore accepted the same settlement offer. The stipulation and order dismissing the action against Quiros provided that "this action is dismissed, pursuant to Fed.R.Civ.P.41(a), as against Mr. Quiros with prejudice and without costs to each party as against the other." While "costs" would include attorneys' fees in cases where statutorily conferred attorneys' fees are involved, see Marek v. Chestny, 473 U.S. 1, 105 S.Ct. 3012 87 L.Ed.2d 1 (1985), they should not include attorneys' fees imposed as a sanction for the bad faith refusal of the same settlement offer earlier in the litigation.

[5] Therefore, the imposition of \$23,000 in attorneys' fees on Pavelic & LeFlore under 28 U.S.C. § 1927 is reaffirmed.

IT IS SO ORDERED.

OPPOSITION BRIEF

2
No. 88-791

Supreme Court, U.S.

FILED

JAN 6 1989

JOSEPH F. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

PAVELIC & LEFLORE (now dissolved),
Petitioner,
— against —

THE MARVEL ENTERTAINMENT GROUP, a division
of CADENCE INDUSTRIES CORPORATION, JAMES
GALTON, AL BRODAX, MICHAEL S. KLEIN, THE
SHUKAT COMPANY, LTD., SCOTT SHUKAT and
PETER S. SHUKAT, ESQ.,

Respondents.

**BRIEF OF RESPONDENTS IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

1. Should this Court grant review of this matter at this juncture, since the Court of Appeals for the Second Circuit has remanded the case to the District Court for further proceedings which might affect the issues for which review is sought?
2. Should this Court grant review of this case when the principal matter involved is New York partnership law, and not federal law?
3. Should this Court grant review of this case when there is no real conflict between the federal courts of appeals and no otherwise special or important reasons for which review should be granted?

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STATUTES INVOLVED

Section 24 of the Partnership Law of the State of New York provides:

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

Rule 11 of the Federal Rules of Civil Procedure in pertinent part provides:

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading motion, or paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

COUNTERSTATEMENT

Claiming that the defendants¹ had conspired to infringe his copyright in a would-be motion picture script (the "Skyrider"), the plaintiff and his then attorney, Ray LeFlore, commenced this action in December 1982. Annexed to the original complaint were copies of various agreements signed by the plaintiff and others, which agreements, if read correctly, provided a complete defense to the claim of copyright infringement, the only federal claim asserted. Defendants² moved for dismissal on this and other bases. The District Court dismissed the complaint on a technical ground, but permitted plaintiff to replead.

On August 1, 1983, an amended complaint was filed. The agreements that had been annexed to the original complaint were no longer annexed to the amended complaint. Instead, it was alleged that plaintiff's signature had been forged on the agreements and that a facsimile of plaintiff's signature had been somehow affixed to the agreements without his authorization. While alleging that the defendants had all conspired to do this, the amended complaint singled out plaintiff's prior attorney of many years, Peter S. Shukat, Esq., as having been the principal architect of this alleged "forgery".

Defendants again moved for summary judgment on the basis that the agreements signed by plaintiff and others vested in them the rights with respect to the "Skyrider", so that there could be no copyright infringement. Plaintiff and Mr. LeFlore opposed this motion by submitting affidavits and memoranda asserting and swearing that the agreements were not genuine and had been forged.

¹ Pursuant to Rule 28.1, the following information is provided. One of the defendants herein is The Marvel Entertainment Group ("Marvel"), once a division of Cadence Industries Corporation ("Cadence"). Marvel was sold by Cadence to New World Entertainment Ltd., its present parent company. It has no subsidiaries or affiliates.

² This brief is submitted on behalf of the respondents listed on the Cover, as well as on behalf of respondent Michael S. Klein.

On July 3, 1984, the District Court denied defendants' motion for summary judgment on the basis of the assertions of forgery, but specifically warned the plaintiff and his counsel of the risk of the imposition of attorneys' fees and costs.

Shortly thereafter in October 1984,³ Mr. LeFlore and Radovan Pavelic formed the law firm of Pavelic and LeFlore, and continued the representation of plaintiff in this action as Pavelic & LeFlore.

In November 1984 the law firm of Pavelic & LeFlore consulted a handwriting expert, Pearl Tytell, to determine whether the already made accusations of "forgery" and "facsimile" could be substantiated. They could not. Nevertheless, the accusations of forgery and facsimile were repeated in documents signed by Mr. LeFlore on behalf of Pavelic & LeFlore and filed with the District Court on May 28, 1985, June 3, 1985 and March 25, 1986. In the pre-trial order signed and filed by Pavelic & LeFlore on March 25, 1986, the allegations of forgery and facsimile made in the amended complaint were specifically restated and realleged.

The trial took place in April and May 1986, lasted six weeks, spanned 4433 pages of trial transcript, involving the presentation of psychiatric testimony concerning plaintiff's mental condition, expert testimony concerning the challenged documents, and included several hundred exhibits. The jury deliberated for only six hours before reaching a verdict rejecting all of plaintiff's claims.

After the verdict, the defendants, as they had warned plaintiff and his counsel on numerous occasions, made post trial motions for sanctions against plaintiff, Ray LeFlore and Pavelic & LeFlore, focusing principally on the false assertions of forgery and facsimile. These motions were supported by affidavits, exhibits and proof of attorneys' fees and expenses in excess of

³ Mr. LeFlore asserted that the firm of Pavelic & LeFlore was formed in May 1984 (App. C, p.147a, n.1). "App." denotes references to the Appendix annexed to the Petition for Certiorari.

\$900,000 through the trial. Neither the plaintiff nor Mr. LeFlore nor Pavelic & LeFlore submitted any opposing affidavit or disputed any of the facts or the reasonableness of the attorneys' fees and expenses.

On August 1, 1986 (App. B), the District Court issued a decision finding, *inter alia*, with respect to the forgery and facsimile claims "that there was no basis in fact for Calloway's assertions and insufficient inquiry by his counsel" (App. A, p.35a). The Court awarded defendants \$200,000 in attorneys' fees as Rule 11 sanctions, to be paid equally by Calloway and by Pavelic & LeFlore. This, according to the District Court, was roughly equivalent to the average expense of each defendant through trial (App. B, pp.130a-135a). Thereafter, a motion was made by Mr. Pavelic on behalf of Pavelic & LeFlore seeking to relieve Pavelic & LeFlore of the sanctions of \$100,000 imposed against it and to have them imposed instead upon Ray LeFlore individually, on the ground, *inter alia*, that Pavelic & LeFlore did not come into existence until the approximate mid-point of this litigation.* Using that as a yardstick, the District Court, on December 23, 1986, amended its prior opinion and imposed sanctions of \$50,000 on Ray LeFlore individually for the period prior to the formation of Pavelic & LeFlore, and \$50,000 on Mr. LeFlore and Pavelic & LeFlore jointly and severally for the period following the formation of Pavelic & LeFlore (App. C, p.156a).

There followed appeals and cross-appeals to the Second Circuit. In a lengthy opinion dated August 12, 1988 (App. A), the Second Circuit affirmed the imposition of sanctions against both LeFlore individually and against Pavelic & LeFlore. Moreover, although plaintiff Calloway had abandoned his appeal, the Second Circuit *sua sponte* reinstated it, vacated the \$100,000

* In an affidavit submitted in connection with that motion, Mr. LeFlore asserted that "Mr. Pavelic was intimately involved (and kept apprised) of all developments and strategy decisions in this action" (JA 2752, Para.2). The Second Circuit noted that Mr. Pavelic "was no passive observer in the Calloway litigation" (App. A, p.64a).

sanctions imposed against Calloway, and remanded the case to the District Court

for further proceedings consistent with this opinion to consider LeFlore's and Pavelic & LeFlore's liability for further sanctions, in the event that sanctions of less than \$100,000 are imposed against Calloway. . . This panel will hear any further appeal in this matter.¹

App. C, p.71a. Pavelic & LeFlore subsequently filed this Petition for Certiorari. No Petition has been filed by Ray LeFlore.

REASONS FOR DENYING THE PETITION

1. *Lack of Ripeness*

Since the Second Circuit has remanded this case to the District Court to further explore the responsibility of the attorneys for the conduct of the lawsuit, this matter is either not ripe for review or would be reviewable

only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court,

as required by Supreme Court Rule 18. Petitioner does not even purport to make such a showing. If for no other reason, judicial economy dictates that *certiorari* be denied on this ground alone.

2. *There is no Special or Important Issue of Federal Law for Review*

Noticeably absent from the Petition for Certiorari is any reference to section 24 of the New York Partnership Law, which provides as follows:

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of

¹ To date, no sanction has been imposed against Mr. Pavelic individually.

the partnership, or with the authority of his copartners, *loss or injury is caused to any person*, not being a partner in the partnership, or *any penalty is incurred*, *the partnership is liable therefor to the same extent as the partner so acting or omitting to act.*

(emphasis added).

Under this New York statute, if a penalty is imposed upon a partner for partnership acts, the partnership bears equal responsibility for the penalty. *See, Metflex Corp. v. Klafter*, 123 A.D.2d 845, 507 N.Y.S.2d 460 (2d Dep't 1986). The source of the penalty, whether it be a state or federal court, a state or federal administrative agency, or a state or federal rule or statute, is immaterial. Accordingly, if a penalty is imposed against Mr. LeFlore or Mr. Pavelic under Fed. R. Civ. P. 11, the partnership of Pavelic & LeFlore is equally liable therefor by New York statute.

The District Court and the Second Circuit, subject to the remand, have concluded that Pavelic & LeFlore should be exempt from the penalties imposed for the first half of the litigation, prior to the formation of Pavelic & LeFlore. That partnership, however, is liable by New York statute for penalties upon its partners for the period after its formation. Thus, there is no issue of federal law presented for review, much less one that is special and important warranting review by this Court. Indeed, since an appeal to this Court would not change the result below, there is no case or controversy presentable to this Court within the meaning of Article III of the United States Constitution. *See, United States Department of Justice v. Provenzano*, 469 U.S. 14, 105 S.Ct. 413, 83 L.Ed.2d 242 (1984); *Hall v. Beals*, 396 U.S. 45, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969); *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974).

3. *There is no Conflict Between the Circuits Warranting Review by this Court*

Petitioner suggests that there is a conflict between the Circuits warranting review by this Court. At best there is an appearance of a conflict, but not a real conflict.

In the instant case, the District Court, in view of the fact that Pavelic & LeFlore was formed at the approximate midpoint of the litigation, made Mr. LeFlore solely liable for the sanctions imposed for the point in time up to the midpoint of the litigation. For the sanctions imposed thereafter, both LeFlore and Pavelic & LeFlore were held responsible. The instant Petition for Certiorari argues only that the sanctions for the period after Pavelic & LeFlore was formed should have been imposed only upon LeFlore and not upon Pavelic & LeFlore because only Mr. LeFlore was a "signatory" under Fed. R. Civ. P. 11.

The Second Circuit's affirmance of the District Court's ruling on this point could have rested solely and simply upon Section 24 of the New York Partnership Law. If penalties are imposed against Mr. LeFlore under Rule 11 for acts committed while he was a partner in Pavelic & LeFlore, then Pavelic & LeFlore is equally responsible for that penalty not because of Rule 11 but because of New York Partnership Law Section 24.

While the Second Circuit went further than was necessary and stated that Rule 11 itself requires that the law firm, together with the individual lawyer who signed the paper on behalf of the law firm, should be sanctionable, the result in the case as against Pavelic & LeFlore is clearly justified on the basis alone of New York Partnership Law.

Petitioner cites two cases which it claims are in conflict with the Second Circuit. They are not. In *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987), the District Court had imposed sanctions against attorney Black, of the law firm Black & Ewart, and against attorney Ewart. Black had signed offending papers, while Ewart had not. The Fifth Circuit ruled that sanctions against Ewart should not have been imposed. That ruling is not in conflict with the Second Circuit decision for several reasons. Here, no sanctions have been imposed against Pavelic individually, but only against the law firm. In the *Robinson* case, sanctions were imposed against Ewart individually, but not against the law firm. That critical distinction is overlooked in the instant Petition. In addition, in *Robinson*, there was no mention of the partnership law of the state where the

law firm practiced and was licensed. In the instant case, the partnership law of New York is of paramount importance.

Finally, the policy issues which concerned the Fifth Circuit are absent from the case before this Court. In *Robinson* the non-signing partner was sanctioned because of his alleged participation in the wrongful conduct. The Fifth Circuit feared that such a sanction would require "satellite litigation" into the actual participation of said partner. To avoid that danger, Rule 11 sanctions were limited solely to the attorney signing the offending paper.

The Second Circuit's decision does not impose personal liability. Its judgment arises from settled principles of partnership law, and operates regardless of the participation of other members of the firm. No occasion for satellite litigation need arise.

The only other case cited by Petitioner to demonstrate a purported conflict between the Circuits is distinguishable for the identical reasons set forth above. See, *In re Ruben*, 825 F.2d 977 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1108 (1988). Notably, no case was cited by Petitioner in which a Circuit Court held that a law firm was exempt from any penalty imposed upon an individual who signed on behalf of that law firm.

4. *There are no Compelling Policy Reasons
Warranting Review by this Court*

Even assuming that this were a proper case to present the issue of whether a law firm is liable for sanctions under Rule 11, in addition to the signatory partner who signs on behalf of the law firm, there would be no compelling policy reasons warranting review by this Court.

Under universally accepted rules of principal and agency, a disclosed principal is liable for the acts of its agent, while the agent is not always liable for his own acts on behalf of a disclosed principal. Accordingly, a law firm would always be liable for the acts of its agents (particularly when the agent is a partner of the law firm, as here), while the agent would not necessarily be liable for his own acts.

Rule 11 does not purport to change the fundamental rule of agency law that makes a disclosed principal liable for the acts of its agent. Rather, in addition to requiring a reasonable inquiry into the facts and the law by the signatory of the pleading or other papers, what Rule 11 does is to make it clear that the agent is also responsible for his own acts when he signs a paper submitted to the Court. A Supreme Court ruling is hardly necessary to opine on such fundamental principles.

CONCLUSION

WHEREFORE, for the reasons stated above, the petition for a writ of *certiorari* should be denied.

Dated: New York, New York
January 5, 1989

Respectfully submitted,

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REPLY

BRIEF

(3)
No. 88-791

Supreme Court, U.S.

FILED

JAN 20 1989

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PAVELIC & LEFLORE (now dissolved),

Petitioner,

vs.

THE MARVEL ENTERTAINMENT GROUP, a division
of CADENCE INDUSTRIES CORPORATION, JAMES
GALTON, AL BRODAX, MICHAEL S. KLEIN, THE
SHUKAT COMPANY, LTD., SCOTT SHUKAT and
PETER S. SHUKAT, ESQ.,

Respondents.

**REPLY BRIEF OF PETITIONER IN RESPONSE
TO RESPONDENTS' BRIEF IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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12/7/88

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INTRODUCTION

This brief is respectfully submitted in reply to respondents' brief in opposition to our petition for a writ of certiorari.

REPLY TO RESPONDENTS' REASONS FOR
FOR DENYING THE PETITION

1. Ripeness

Respondents contend that certiorari should be denied for lack of ripeness because the court of appeals has remanded this case to the district court to review its assessment of sanctions against the plaintiff. Respondents' argument is without merit.

The court of appeals' decision affirmed an award of \$50,000 against Petitioner. In its remand, the court of appeals further instructed that if the plaintiff were relieved of sanctions, the

district court should consider whether or not to transfer this sanction obligation to petitioner.

The issue of the Rule 11 liability as a matter of law of the petitioning law firm, Pavelic & LeFlore, -- the precise legal issue presented to this Court in our petition -- was considered and resolved both in the district court and in the court of appeals. (See App. A, p.64a).

The remand, for fine-tuning of the precise dollar amount for which plaintiff, Ray LeFlore and Pavelic & LeFlore are to be held responsible, has no bearing or impact whatever upon the pivotal legal issue before this Court. The result in the district court will be, apart from the precise monetary impact upon the parties to this case, an

anecdotal footnote to the far-reaching interpretation by the court of appeals of Rule 11.

Both lower courts have spoken finally on the legal issue under review. An award of \$50,000 against Petitioner has been affirmed. Our case has not bypassed judgment in a lower court as had those cited in the body of Rule 18 of the Rules of this Court.

It follows, we respectfully submit, that the issues presented in our petition are indeed ripe for review.

2. This Case Involves an Important Issue of Federal Law

Respondents' contention that the issue presented to this Court is controlled by New York State partnership law (Pet. Br., pp. 5-6) highlights the need for review by this Court.

Rule 11 of the Federal Rules of Civil Procedure represents a national effort to curtail baseless actions and pleadings in the federal courts.

It is unthinkable that the degree of Rule 11 responsibility to be borne by signing counsel and his law firm should vary with the vagaries of the specific professional corporation or partnership law prevailing in the state wherein each district court sits.¹

Anarchy would grip Rule 11, as inequitable and uneven Rule 11 interpretations were impelled by differing state laws. Ironically,

1. The court of appeals itself recognized that the New York Partnership Law could not control its interpretation of Rule 11 (App. A, p.63a).

lawyers might be tempted to forum-shop their doubtful cases into the already overburdened district courts in New York because under New York law, co-shareholders, officers and employees of a professional service corporation are not vicariously responsible for the wrongs of shareholders, see Paciello v. Patel, 83 A.D.2d 73, 443 N.Y.S.2d 403 (2d Dept. 1981).

Finally, the amount of punitive sanctions under Rule 11 is a function of many variables, including the sanctioned attorney's financial means (See App. A, p. 59a). Respondents' suggestion that New York partnership law globally moots Rule 11 analysis by automatically spreading punitive sanctions among all members of a firm is facially absurd and against public policy.

3. There is a Conflict between the Circuits

Respondents claim that there is no conflict between the decision of the court of appeals below and that of the Fifth Circuit Court of Appeals in Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987) because "[i]n the Robinson case, sanctions were imposed against Ewart individually, but not against the law firm." (Resp. Br., p.7). Respondents' analysis is wrong.

It is correct that in Robinson the district court imposed sanctions against Black (the signing attorney) and Ewart (the non-signing attorney) of the firm of Black & Ewart. However, the court of appeals explicitly rejected a finding of Rule 11 responsibility in Ewart because

of the fact of his partnership with Black.

It held:

"... the only mention of Ewart's name on the original petition in state court, or on any of the papers filed in the suit, is that the law firm's name, Black & Ewart, is mentioned. Rule 11 requires a pleading, motion, or paper to be signed by at least one attorney "in his individual name." Fed.R.Civ.P.11 (emphasis added). Thus, it is the attorney who signs the document, not the firm to which that attorney belongs, that certifies that the document conforms to the requirements of the rule and accepts the responsibility if it does not. Black's signature indicates that he, not everyone at Black & Ewart, is responsible for the pleadings he signed.

808 F.2d at 1132 (footnote omitted).

Respondents' contention that "[t]he Second Circuit's decision does not impose personal liability . . ." (Resp. Br., p.8) is both inaccurate and a remarkable assertion made by parties who have already

sought to serve restraining notices upon Mr. Pavelic, personally.

4. There are Compelling Policy Reasons Warranting Review by this Court

In the final analysis, we respectfully submit that the Second Circuit Court of Appeals has improperly deviated, in its interpretation of Rule 11, from the plain language and meaning of the Rule.

Its decision is directly in conflict with that of the Fifth Circuit Court of Appeals in Robinson.

Moreover, to the degree the court of appeals' decision is founded in the New York State Partnership Law, it leads to untenable results in tying attorneys' responsibility to federal courts to their status as sole practitioners, partners, or shareholders of law firms, and in

hinging responsibility upon the various states' partnership and corporation laws.

Rule 11 imposes sanctions under federal law. The responsibility of attorneys for these sanctions must be nationally uniform, and a function of federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

In The
Supreme Court of the United States
October Term, 1988

PAVELIC & LEFLORE (now dissolved),

Petitioner,

v.

THE MARVEL ENTERTAINMENT GROUP, a division of
CADENCE INDUSTRIES CORPORATION, JAMES
GALTON, AL BRODAX, MICHAEL S. KLEIN, THE
SHUKAT COMPANY, LTD., SCOTT SHUKAT and
PETER S. SHUKAT, ESQ.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari
filed November 10, 1988
Certiorari granted February 21, 1989

275 pp
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The following opinions, decisions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion and order of the United States District Court for the Southern District of New York, dated August 1, 1986.....	72a
Opinion and order of the United States District Court for the Southern District of New York, dated December 23, 1986.....	143a
Opinion of the United States Court of Appeals for the Second Circuit, dated August 12, 1988.....	1a

RELEVANT DISTRICT COURT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
12/29/82	Filing of complaint; summons and notice issued.
7/1/83	Filing of opinion on defendants' motion to dismiss under rules 8, 9, 10, 12(b), 12(e), 12(f). Defendants permitted to renew their objections and any others they may have at the appropriate time. The complaint is dismissed with leave to file an amended complaint within thirty (30) days of the signing of the opinion.
8/1/83	Filing of amended complaint.
12/23/83	Filing of opinion on defendants' motions under rules 8, 12(b)(1), 12(b)(2), 12(b), 12(c), 12(e), 12(f) and 56 to dismiss the amended complaint and for other relief. Motions granted in part and denied in part. The conspiracy cause of action is dismissed to the extent stated therein, the other motions are denied.
1/10/84	Filing of judgment ordering that the amended complaint is dismissed as to defendants Peter Shukat, Scott Shukat and The Shukat Company, Ltd. ("Shukat Co.") and the claim for punitive damages of copyright infringement is stricken. The conspiracy cause of action is dismissed to the extent stated in the Court's Opinion.
1/18/84	Filing of answer of defendants, The Marvel Entertainment Group ("Marvel").
1/19/84	Filing of answer of Al Brodax ("Brodax").

1/19/84 Filing of answer of defendants Michael Klein ("Klein") and LMN Productions ("LMN") to the Amended Complaint.

1/27/84 Filing of third-party complaint of defendants and third-party plaintiff Marvel.

1/27/84 Filing of answer of defendants Klein and LMN to cross-claims of Marvel and James Galton ("Galton").

1/27/84 Filing of answer of Klein and LMN to cross-claim of Brodax.

1/27/84 Filing of amended answer of LMN and Klein to amended complaint.

1/30/84 Filing of defendant and third-party plaintiff Brodax's third-party complaint.

2/7/84 Filing of defendants' submissions in support of motion for summary judgment under Rule 56.

2/7/84 Filing of answer of Marvel and Galton to cross claim of LMN and Klein.

2/7/84 Filing of answer of defendant Brodax to cross claim of defendants LMN and Klein.

2/8/84 Filing of plaintiff's Notice of Appeal to the USCA from judgment entered January 10, 1984, dismissing the amended complaint against defendants Dumler and Giroux, Peter Shukat, Scott Shukat and Shukat Co. and dismissing the third cause of action.

2/8/84 Filing of answer of Louis Quiros ("Quiros") to cross-claim of Brodax, to the complaint and to cross-claim of Marvel and Galton.

2/9/84 Filing of defendant Quiros' submissions in support of motion to dismiss the amended complaint as against Quiros and to strike certain allegations under Rules 9(b) and 12(b) (6).

2/10/84 Filing of answer of Brodax to cross claim of defendant Quiros.

2/14/89 Filing of defendants' Marvel's and Galton's submissions in support of motion for summary judgment pursuant to Rule 56 dismissing cross-claim of Quiros.

2/14/84 Filing of answer of defendants Marvel and Galton to the cross-claim of Quiros.

2/14/84 Filing of answer of Klein and LMN to the cross-claim of Brodax.

3/1/84 Filing of defendants LMN's and Klein's submissions in support of their motions for summary judgment dismissing the amended complaint and the third-party complaint.

4/3/84 Filing of submissions in support of defendant Quiros' motion to strike the third party complaint.

4/3/84 Filing of affidavit of Brodax opposing plaintiff's affidavit.

4/5/84 Filing of submissions in support of plaintiff's cross-motion for partial summary judgment and in opposition to defendants' motion to dismiss, and for summary judgment. Submission includes affidavit of Northern J. Calloway dated April 2, 1988.

4/5/84 Filing of plaintiff's answer to counterclaim of defendant Quiros.

5/2/84 Filing of Marvel's response to part III of plaintiff's 3(g) statement and Klein and LMN's 3(g) statement.

5/2/84 Filing of defendants' Marvel, Galton, Brodax and Quiros' reply papers in support of their motions for summary judgment and to dismiss the amended complaint and in opposition to plaintiff's cross-motion.

- 5/3/84 Filing of Brodax' reply memorandum to plaintiff's cross-motion.
- 5/4/84 Filing of Klein's and LMN's submissions in opposition to plaintiff's cross-motion and defendants Marvel's, Galton's and Brodax' motion to dismiss the cross-claim.
- 7/5/84 Filing of opinion on defendants' motions to dismiss the amended complaint and plaintiff's cross-motion for partial summary judgment. Quiros' motion to dismiss is granted and all other motions denied.
- 9/7/84 Filing of third-party complaint by Klein and LMN.
- 9/10/84 Filing of third-party complaint by Quiros.
- 5/31/85 Filing of order directing that the amended complaint be dismissed with prejudice against defendants/third-party defendants Dumler and Giroux, without costs and that judgment be entered.
- 4/10/86 Filing of stipulation and order that Quiros shall return to Calloway all property relating to the project "Skyrider" and that the action is dismissed, pursuant to rule 41 as against Mr. Quiros with prejudice and without costs to each party.
- 4/7/86-
5/14/86 Jury Trial before Judge Sweet.
- 5/16/86 Filing of plaintiff's proposed pretrial order.
- 5/19/86 Filing of letter to Judge Sweet dated April 1, 1986 from Raymond L. Levites in reference to directions at the pre-trial conference March 31, 1986. Submission of the amendment of plaintiff's pleadings and contentions deemed filed April 7, 1986.
- 5/22/86 Filing of final pre-trial order.

- 5/22/86 Filing of defendants' proposed pre-trial orders.
- 5/23/86 Filing of order directing that the complaint is dismissed and the cross-claims asserted by defendants Marvel, Galton, Brodax, Shukat Co., Scott Shukat and Peter Shukat against defendant Quiros are dismissed with prejudice and without costs.
- 6/13/86 Filing of defendants Brodax', Marvel's and Galton's submissions in support of their respective motions for an order awarding costs and attorney's fees.
- 6/16/86 Filing of third-party defendant Scott Shukat's papers in support of motion for an order for expenses and attorney's fees.
- 6/26/86 Filing of plaintiff's submissions in opposition to defendants' post-trial motions for sanctions or discretionary costs and attorney's fees.
- 6/27/86 Filing of plaintiff's notice of appeal to the USCA for the Second Circuit from the final judgment entered on May 28, 1986.
- 8/4/86 Filing of opinion and order on defendants' motion to award costs, expenses and attorney's fees and on cross-motions regarding the taxation of costs. Motions are granted in part and denied in part. Defendants are awarded \$200,000 in attorneys' fees as Rule 11 sanctions to be paid equally by Calloway and Pavelic & LeFlore. Calloway is to pay \$5,000 to S. Shukat pursuant to 17 U.S.C. §505. Counsel for Quiros is granted \$23,000 from Pavelic & LeFlore as a sanction under 28 U.S.C. §1927. The clerk is directed to award Marvel and Galton costs of \$11,333.20.

- 9/3/86 Filing of notice of appeal of Northern J. Calloway from post trial order and opinion.
- 9/3/86 Filing of notice of appeal of Pavelic & LeFlore, Esqs., counsel at trial for plaintiff, to USCA for the Second Circuit from the post-trial order and opinion.
- 9/9/86 Filing of defendant Brodax's affidavit pursuant to opinion and order of August 1, 1986 regarding requests for relief by any party.
- 9/10/86 Filing of Pavelic & LeFlore's submissions in support of motion for an order granting admission to the Southern District of New York *pro hac vice*.
- 9/10/86 Filing of Pavelic & LeFlore's submissions in opposition to the defendants' post-trial motions for sanctions.
- 9/12/86 Filing of defendants Brodax', Marvel's and Galton's submissions in opposition to the motion submitted by Pavelic & LeFlore seeking relief from sanctions.
- 9/19/86 Filing of plaintiff's submissions in support of motion for an order pursuant to rule 60(b) to amend opinion and order of August 1, 1986.
- 12/29/86 Filing of opinion and order imposing sanctions on both individual attorney Ray L. LeFlore, and the law firm Pavelic & LeFlore, on whose behalf he signed the offending papers. In addition, the amount of attorney's fees charged to Pavelic & LeFlore is ordered reduced to take account of the period of time in which the firm Pavelic & LeFlore was not in existence. Sanctions of \$50,000 are imposed upon Ray L. LeFlore individually and \$50,000 on Ray L. LeFlore and Pavelic & LeFlore jointly and severally.

- The imposition of \$23,000 in attorney's fees on Pavelic & LeFlore under 28 U.S.C. 1927 is reaffirmed.
- 1/15/87 Transmission of original record on appeal to USCA for the Second Circuit.
- 2/2/87 Filing of judgment ordering that a total of \$200,000.00 is to be awarded to defendants, \$100,000.00 of which is to be paid by plaintiff Northern J. Calloway, \$50,000.00 of which is to be paid by Ray L. LeFlore, individually, and \$50,000.00 of which is to be paid by Ray L. LeFlore and Pavelic & LeFlore, jointly and severally.
- 2/17/87 Motion for stay of enforcement of judgment granted.
- 3/4/87 Filing notice of appeal of Ray L. LeFlore individually and as a partner in Pavelic & LeFlore, from each and every part of the judgment filed on February 2, 1987.
- 3/10/87 Filing of Pavelic & LeFlore's amended notice of appeal, amending previously filed notice of appeal to the extent necessary in regard to the opinion of the Judge dated December 23, 1986 and appeal of the judgment entered on February 2, 1987.
- 3/27/87 Filing of bond on undertaking on appeal from judgment as modified, pursuant to order, in the amount of One Hundred Thousand Dollars (\$100,000.00) by Travelers Indemnity Company.
- 6/1/87 Filing of true copy of order of the USCA for the Second Circuit that the *pro se* motion of plaintiff Calloway for appointment of counsel is denied without prejudice to Calloway submitting affidavit regarding his inability to retain counsel.
-

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

_____	X
NORTHERN J. CALLOWAY,	:
individually and on behalf of	:
LMN PRODUCTIONS, INC.,	:
Plaintiffs,	:
-against-	:
THE MARVEL ENTERTAINMENT	COMPLAINT
GROUP, a division of CADENCE	JURY TRIAL
INDUSTRIES CORPORATION,	DEMANDED
JAMES GALTON, AL BRODAX,	:
MICHAEL S. KLEIN, LUIS	:
QUIROS, DUMLER & GIROUX,	:
THE SHUKAT COMPANY, LTD.,	:
SCOTT SHUKAT, PETER S.	:
SHUKAT, ESQ. and, where neces-	:
sary, LMN PRODUCTIONS, INC.,	:
Defendants.	:
_____	X

Plaintiff, Northern J. Calloway ("Calloway"), by his attorneys, LeFLORE and EGAN, for his complaint herein, alleges as follows:

FOR AN INTRODUCTORY

1. This is an action for damages and injunctive relief, brought by plaintiff to enforce and to protect his rights as an artist and as the Producer and copyright owner of that motion picture project, tentatively entitled "THE SKYRIDER", which plaintiff conceived and developed as a feature-length science fiction musical, with

state of the art computerized animation, for children and family entertainment. Because the story and characters created by plaintiff are both heroic and futuristic, plaintiff's creations in "THE SKYRIDER" were also intended as an additional source of revenues from merchandizing and licensing in the children's market.

2. Defendants misappropriated plaintiff's copyrighted materials by conspiring between and amongst themselves, without regard to his copyrights in respect of "THE SKYRIDER", and used plaintiff's property unlawfully, without his knowledge or consent, for their own business purposes. Defendants' misuse of plaintiff's materials not only infringed plaintiff's copyrights in respect of "THE SKYRIDER", but also violated the express provisions of those contracts with plaintiff - where such contracts existed - into which defendants entered, in furtherance of their plan to deprive plaintiff of his rights in respect of "THE SKYRIDER". Defendants entered such contracts and failed to disclose their intentions not to abide by the terms and provisions of those contracts to which they agreed, thereby defrauding plaintiff, competing unfairly with him and breaching their implied covenants of good faith and fair dealing.

3. Defendants have also distorted and defamed plaintiff's copyrighted works, and derivations thereof, by adding new offensive characters and vulgar language to "THE SKYRIDER", without plaintiff's knowledge or consent. Defendants' distortions of plaintiff's copyrighted materials demeaned and cheapened his artistic creations and further infringed his copyright.

4. Where defendants have also used or permitted the use of plaintiff's name and reputation in connection with their unlawful distribution of a product not written or otherwise endorsed by plaintiff, defendants have knowingly slandered his business reputation, violated his right of *droit moral* and violated his statutory rights of privacy.

5. Plaintiff's own business manager and personal attorney are made defendants because the others could not have succeeded without their active participation and collusion. Plaintiff's manager and his attorney not only combined and conspired with their co-defendants to infringe plaintiff's copyrights and to evade his contractual rights as the creator and the Producer of "THE SKYRIDER", as aforesaid, but also abused their positions of trust and confidence, on which plaintiff relied.

JURISDICTION

6. Jurisdiction of this action is founded upon:

(a) Title 17 of the United States Code, entitled "Copyrights," as amended in 1976, 17 U.S.C. Sections 101, *et. seq.*, which reserves to the owner of any copyright the exclusive right

(i) to reproduce his copyrighted work,

(ii) to prepare any derivative work based upon his copyrighted work, and

(iii) to distribute his copyrighted work, or

(iv) to withhold his permission from others to do the foregoing;

(b) Section 1338 of the Judiciary Code, 28 U.S.C. § 1338, which confers exclusive jurisdiction upon the federal courts in copyright cases, along with original jurisdiction of any attendant claim of unfair competition;

(c) Sections 1331 and 1337 of the Judiciary Code, 28 U.S.C. §§ 1331 and 1337, because the amount in controversy exceeds the sum of \$10,000, exclusive of interest and costs, and arises under the laws of the United States which regulate commerce; and

(d) principals of pendant jurisdiction in respect of those claims asserted herein which arise under state law.

PLAINTIFF

7. Plaintiff's reputation and creativity are highly regarded in New York in the entertainment industry. As "David of Sesame Street", he has been a well-recognized television personality for more than thirteen years. Sesame Street, and its characters, is one of the most watched shows in the television industry, seen daily by hundreds of millions of pre-school and elementary school children. Mr. Calloway is thus one of the most identifiable stars on television today, seen regularly in twenty-seven countries outside the continental United States.

8. While Mr. Calloway is best known as "David of Sesame Street", his career spans more than seventeen years, fifteen of which have been spent in continuous employment in the television industry. Mr. Calloway has performed on other day-time programs and starred in

other made-for-TV children's specials, such as "Gordon" . . . Starring Northern J. Calloway, an NBC children's special, and other cultural programs such as "On Being Black", a TV mini-series produced by WGBH. His theatre background has also included starring and supporting roles in classical and contemporary theatre productions by, among others, The Lincoln Center Repertory Company, The Stratford Ontario Shakespeare Festival in Canada, The New York Shakespearean Festival under the direction of Joseph Papp, and The Circle in the Square; he has also appeared in The Obie Award-winning off-Broadway production of *The Me Nobody Knows*, the off-Broadway production of *Salvation*, the Broadway and London productions of the Tony Award-winning *Pippin* (as the leading player), the Broadway production of the *Poison Tree*, the Broadway production of *Whose Life Is It Anyway?* (starring Mary Tyler Moore), and The New Federal Theatre production of *Louie*, as Louis Armstrong.

9. As a creative artist, Mr. Calloway has written and produced five (5) pilot-scripts for television in conjunction with Ed Sullivan Productions, CBS, Paramount, and NBC; written musicals for Broadway production, written motion-picture screen plays, created a series of highly successful children's books - "*Northern J. Calloway presents: I Been There*" and "*Northern J. Calloway Presents: Supervroomer*" - and has conceived, written and produced two highly successful Sesame Street albums for CTW's Children's Record Production Company - "*David's Daydreamin' on a Rainy Day*" and "*The Sesame Street Block Party*". To his credit, Mr. Calloway has five (5) participating Emmy Awards, one (1) individual Emmy Award, four (4) participating Grammy Awards, a Circle Critic's

Award and numerous other testimonials to his artistic accomplishments.

10. For the last several years, Mr. Calloway has dedicated himself to the furtherance of better children's programming in all areas of the media.

DEFENDANTS

11. LMN Productions, Inc. ("LMN"), on whose behalf this action is brought derivatively, in part, was organized in New York, in 1981, for the singular purpose of serving as a vehicle for the financing and marketing of Mr. Calloway's production of "THE SKYRIDER". It is named a defendant, where necessary, in order that complete relief may be accorded in this action.

12. The Marvel Entertainment Group is, upon information and belief, a division of Cadence Industries Corporation (hereinafter referred to as "Marvel"), a New Jersey corporation, with offices at 575 Madison Avenue, in the City, County and State of New York. At all relevant times hereinafter, Marvel was a significant factor in the entertainment and amusement industries in the United States, with an established system for marketing and merchandizing its properties throughout the world.

13. At all relevant times hereinafter, upon information and belief, defendant, James Galton ("Galton"), was an executive officer of Marvel, experienced in the fields of entertainment and amusement, as those terms are generally used and understood in the entertainment and amusement industries. Each action taken by Galton, as

hereinafter alleged, was done as an agent of Marvel and on its behalf.

14. At all relevant times, upon information and belief, defendant, Al Brodax ("Brodax"), was an executive producer and authorized agent of Marvel. Mr. Brodax was also experienced in the entertainment and amusement industries. Each action taken by Brodax, as hereinafter alleged, was done as an agent of Marvel and on its behalf.

15. Upon information and belief, defendant, Michael B. Klein ("Klein"), resides in the City, County and State of New York. At all relevant times hereinafter, Klein was an officer and director of LMN, engaged by Mr. Calloway to assist in the production of "THE SKYRIDER"

16. Upon information and belief, defendant, Luis Quiros ("Quiros"), resides in Larchmont, New York. At all relevant times hereinafter, Quiros was an officer and director of LMN, engaged by Mr. Calloway to assist in the production of "THE SKYRIDER".

17. Upon information and belief, defendant, Dumler & Giroux ("Dumler"), is a partnership of attorneys, engaged in the practice of law, with offices at 575 Madison Avenue, in the City, County and State of New York. At all relevant times, Dumler acted, or purported to act, as LMN's attorneys.

18. Upon information and belief, defendant, The Shukat Company, Ltd. ("The Shukat Company"), is a New York corporation. At all relevant times hereinafter, The Shukat Company acted, or purported to act, as Mr.

Calloway's exclusive personal manager, pursuant to contract, empowered to act as agent on his behalf.

19. Upon information and belief, defendant, Scott Shukat, is an individual with offices in the City, County and State of New York. Under the terms of that contract between Mr. Calloway and The Shukat Company, referred to above, Scott Shukat was to perform its managerial obligations thereunder. Each action taken by Scott Shukat, as hereinafter alleged, was done as an agent of The Shukat Company and on its behalf.

20. Upon information and belief, defendant, Peter S. Shukat, Esq. ("Peter Shukat") is an attorney, admitted to practice in New York, with offices in the City, County and State of New York. At all relevant times hereinafter, Peter Shukat acted, or purported to act, as Mr. Calloway's personal attorney.

BACKGROUND

21. Plaintiff conceived "THE SKYRIDER" as a natural extension of his involvement in quality children's programming, consistent with his image as "David of Sesame Street".

22. In 1979, in collaboration with Gavin Spencer ("Spencer"), plaintiff wrote and caused to be recorded a series of original musical compositions for "THE SKYRIDER", which plaintiff and Spencer thereafter caused to be copyrighted, by complying in all respects with The Copyright Law of 1976, securing all exclusive rights and privileges in and to the copyright of such works.

23. Thereafter, in 1979, in consultation with David Stephen Roth, plaintiff caused to be written a formal synopsis, outline and script for use in conjunction with the music and lyrics intended for "THE SKYRIDER". The script contains a substantial amount of material wholly original, constituting a copyrightable work under the laws of the United States. Although a work done for hire, Roth caused the script to be copyrighted, by complying in all respects with The Copyright Act of 1976, securing all exclusive rights and privileges in and to the copyright of such work. In order to resolve any question concerning the ownership of that copyright, plaintiff and Roth subsequently agreed that all right, title and interest were vested in the plaintiff. Copies of Roth's Synopsis and Outline for "THE SKYRIDER" are annexed as Exhibit A.

24. By January, 1981, when plaintiff engaged Klein and Quiros to assist in the financing of his production of "THE SKYRIDER", plaintiff's property was fully developed, at plaintiff's expense, with illustrations, the script, the songs referred to above, a highly developed marketing plan and a preliminary budget for the proposed project.

25. Before plaintiff was introduced to Marvel by Klein and Quiros, plaintiff had presented his project to others who had evidenced a serious interest in financing or otherwise participating in his production of "THE SKYRIDER".

FOR A FIRST CAUSE OF ACTION

26. Repeats and realleges each allegation of paragraphs 6 through 25, hereof.

27. In March and April, 1981, plaintiff presented "THE SKYRIDER" to Marvel, by displaying and delivering copies of his works and disclosing to Marvel all other commercial aspects of "THE SKYRIDER".

28. Galton and Brodax, on Marvel's behalf, proclaimed the project a capital success, both as a promising candidate for "box-office" receipts and profitable merchandizing for Marvel, and as a prime opportunity for exploitation by Marvel's world-wide publishing operations, particularly in its comic books, comic strips and costumed-character licensing. Marvel proposed at their meeting in April to produce the project for a budget of five million (\$5,000,000) dollars and to control the project, as its "producer", with full and complete control of its budget and artistic content.

29. What Marvel proposed for the production of "THE SKYRIDER", as a "producer", was beyond the role intended for it, as a "production house" or jobber, and unacceptable to plaintiff. Plaintiff, therefore, ceased all further negotiations with Marvel.

30. Klein and Quiros refused to accede to plaintiff's rejection of Marvel's overtures in respect of "THE SKYRIDER" and, upon information and belief, continued to meet with Marvel concerning "THE SKYRIDER", without plaintiff's knowledge or consent. With Klein's and Quiros' cooperation, upon information and belief, Galton and Brodax embarked upon a scheme and course of conduct designed to misappropriate and use for their own purposes the characters and general plot of "THE SKYRIDER", as well as the marketing concepts developed by plaintiff.

31. During the Summer and Fall of 1981, with Klein's and Quiros' active participation, Galton and Brodax wrote and caused to be written a work, tentatively entitled "SY RYDER", copied in large part from plaintiff's copyrighted works, using the characters and format of "THE SKYRIDER".

32. Marvel's infringing work changed substantially the premise and focus of plaintiff's copyrighted materials:

- Where plaintiff's concept of "THE SKYRIDER" was consistent with his dedication to quality children's programming, Marvel distributed an outline which publicized "SY RYDER" as a picture "designed to enthrall the pubescent to the senile";

- Where plaintiff purposefully avoided in "THE SKYRIDER" any reference to the worldly-realities of day-to-day existence on the planet Earth, Marvel distributed a derivation of plaintiff's works for a movie entitled "SY RYDER" which appeared to base their protagonist's "escape" into fantasy upon the inanity of his routine as "a motorman on the 8th Avenue Line";

- Where plaintiff sought to create a futuristic model in "THE SKYRIDER", Marvel distributed an outline with a premise for "SY RYDER" which stressed "the surreal scamper that takes Sy . . . to his well-neglected Columbia Heights apartment . . . [where] there are gunshots, sirens, screams, falling bodies to avoid [and] a variety of street proposals to avoid . . . ;"

- Where plaintiff made his characters heroic and larger than life in "THE SKYRIDER", Marvel distributed an outline for "SY RYDER" which resorted to characters like the "excitable, strange-eyed, platinum-haired black man", wearing a "newly acquired pinky ring", and "Lucullus, his woman";

- Where plaintiff sought to create with "THE SKYRIDER" a motion picture for children and family entertainment, Marvel distributed an outline for "SY RYDER" replete with distasteful allusions to "cockroaches", "toilet[s] on the BMT", "indigestion", "mayhem" and "sludge".

A copy of Marvel's infringing outline is annexed as Exhibit B.

33. Marvel used other language and scene depictions offensive to plaintiff because of their vulgar references and stereotypical appeal, entirely inconsistent with plaintiff's original conception and copyrights in respect of "THE SKYRIDER".

34. Galton and Brodax, with Klein and Quiros, then caused their unlawful work to be distributed throughout the entertainment industry and in the financial community involved with such projects. Defendants infringing work was also distributed and shown to numerous other individuals in a position to finance in whole, or in part, a production of "THE SKYRIDER".

35. Defendants unlawful infringement of plaintiff's copyrights in respect of "THE SKYRIDER" were knowing and willful, and done with a conscious intent of depriving plaintiff of the value of his copyrights.

36. As a result of the foregoing, plaintiff has been damaged, for which defendants are liable as a result of their unlawful infringement of plaintiff's copyrights in respect of "THE SKYRIDER".

FOR A SECOND CAUSE OF ACTION

37. Repeats and realleges each allegation of paragraphs 6 through 25, and 27 through 35, hereof.

38. The work distributed by Marvel, as aforesaid, distorted plaintiff's original artistic creation, by interjecting extraneous characters and offensive language, causing the work as a whole to be demeaned and cheapened.

39. By their conduct, defendants have so confused their own work with plaintiff's "THE SKYRIDER" that it ("THE SKYRIDER") can no longer be sold on its own merit as a motion picture project for children and family entertainment, or promoted as a suitable subject for merchandizing in the children's market.

40. As a result of the foregoing, Marvel has maliciously destroyed and taken from plaintiff the entire value of his copyrights in respect of "THE SKYRIDER", for which it is liable to plaintiff.

FOR A THIRD CAUSE OF ACTION

41. Repeats and realleges each allegation of paragraphs 6 through 25, 27 through 35, 38 and 39, hereof.

42. As an integral part of its unlawful distribution of "SY RYDER" as a distortion of plaintiff's copyrighted materials, Marvel purposefully used plaintiff's name and business reputation, without plaintiff's knowledge or consent, in form and in substance in a manner seriously detrimental to his image, his career, his standing in the black community, and his reputation in the entertainment industry generally.

43. By their distribution of "SY RYDER", as aforesaid, defendants have also foreclosed plaintiff from credibly denying his affiliation with their product or taking credit for the original "THE SKYRIDER" as plaintiff conceived and developed it.

44. Defendants misconduct, as aforesaid, violated plaintiff's rights of privacy and *droit moral*.

45. As a result of the foregoing, plaintiff has been damaged by Marvel's defamation and slander of his name and reputation in the entertainment industry, for which it is liable to plaintiff.

FOR A FOURTH CAUSE OF ACTION

46. Repeats and realleges each allegation of paragraphs 6 through 25, 27 through 35, 38, 39 and 42 through 44, hereof.

47. While Klein and Quiros continued to meet with Marvel without plaintiff's knowledge or consent, plaintiff and Klein and Quiros completed negotiations regarding "THE SKYRIDER", and subsequently entered into a series of agreements, memorializing their respective rights and obligations. The agreements referred to consist of

- (i) A Shareholder's Agreement for LMN, dated June 8, 1981
- (ii) An Option Agreement for "THE SKYRIDER";
- (iii) A Writer's Agreement between LMN and Callo-way dated June 8, 1981; and
- (iv) A Music Agreement between LMN and Callo-way and Spencer; dated June 8, 1981.

Copies of the foregoing agreements are attached as Exhibit C.

48. The Shareholder's Agreement for LMN, which plaintiff and Klein and Quiros executed as of June 8, 1981, reserved to plaintiff all artistic decisions in respect of the production of "THE SKYRIDER", and imposed upon Klein and Quiros unanimous consent for any decision regarding "which animation houses to use and who shall direct the motion picture." Plaintiff also required, and obtained Klein's and Quiros' consent to, screen credit for plaintiff in any production of "THE SKYRIDER" as the Producer of the motion picture.

49. The Option Agreement for LMN, which plaintiff and Klein and Quiros executed as of June 8, 1981, granted to LMN a limited option to acquire plaintiff's rights in "THE SKYRIDER". To the extent relevant, it states:

"1. You shall have a period of Seventy-five (75) days from the date hereof in order to secure financing in the minimum sum of Thirty-Five Thousand Dollars (\$35,000), which sums shall be used as pre-production expenses in connection with the production of a motion picture based on the Property (the "Motion Picture"). Said option shall be exercised by the payment by you within said Seventy-five (75) day period of the sums referred to in paragraph 2(a) of the agreement of even date between you and Northern Calloway ("Calloway") to write a script based on the property . . . , and the sums referred to in paragraph 4(a) of the agreement of even date between you, Gavin Spencer ("Spencer") and Calloway to compose musical compositions to be included in the Motion Picture. . . .

* * *

3. Provided that you have complied with the provision of paragraph 1 hereof, you shall then have a period of one (1) year from the date of the payments referred to in paragraph 1 hereof within which to raise the sums required to produce the Motion Picture (the "Budget"). If the Budget has been raised, production of the Motion Picture shall commence within One Hundred Eighty (180) days thereafter. If the Budget is not raised, or if the Budget is raised and if the production of drawings (storyboards) for the Motion Picture is not commenced within one Hundred Eighty (180) days from the raising of the budget, then unless the parties hereto agree, all rights hereinabove granted to you shall terminate, and all rights in and to the Property, including those rights referred to in the Agreement, shall revert to Spencer and Calloway."

50. As shown below Klein and Quiros never intended to abide by the terms and conditions of their contracts with plaintiff, to which they agreed; instead, from June to September, 1981, upon information and belief, Klein and Quiros, continued to act without regard to their duties to LMN and plaintiff, in furtherance of their conspiracy with Marvel in respect of "THE SKYRIDER".

51. At Marvel's suggestion, upon information and belief, Klein and Quiros retained Dumler to purport to act as counsel to LMN, and thereafter used his services to attempt to evade LMN's undertakings in its contracts with plaintiff, as well as their own with plaintiff.

52. Under the terms and provisions of the Option Agreement referred to above, all right, title and interest in "THE SKYRIDER" were to revert to plaintiff and

Spencer, as their interests appeared, on or before August 22, 1981. On August 10, 1981, upon information and belief, Dumler requested on LMN's behalf that plaintiff extend the option for "THE SKYRIDER" set forth in its agreement of June 8, 1981. Plaintiff agreed to extend the option period an additional fifteen (15) days to September 5, 1981.

53. On or about September 2, 1981, upon information and belief, at Dumler's suggestion, Klein and Quiros asked plaintiff to attend another meeting with Marvel to discuss its continuing interest in plaintiff's project, to which plaintiff agreed.

54. Plaintiff and Klein and Quiros first met at Dumler's office at 575 Madison Avenue, from whence they went to Marvel's offices in the same building at 575 Madison Avenue.

55. At their meeting on or about September 2, 1981, Galton and Brodax again proposed to plaintiff on Marvel's behalf to produce "THE SKYRIDER" in conjunction with LMN, based upon a budget of five million (\$5,000,000) dollars, subject to Marvel's full and complete control of the budget and production of "THE SKYRIDER". The budget proposed by Marvel not only failed to account properly for all expenses for the production of "THE SKYRIDER", but also failed to provide for those costs required to produce "THE SKYRIDER" in the form proposed by plaintiff, as had been agreed contractually by Klein, Quiros and LMN.

56. Plaintiff, rejected again any involvement by Marvel on terms inconsistent with his agreements with LMN, dated June 8, 1981.

57. On or about September 3, 1981, in order to attempt to preserve the option to produce and participate in the revenues to be derived from "THE SKYRIDER", upon information and belief, Galton and Brodax, on Marvel's behalf, and Dumler and Klein and Quiros, on LMN's behalf, without plaintiff's knowledge or consent, solicited Peter Shukat - as plaintiff's attorney - to purport to grant to LMN a further extension of one (1) week in which to exercise its option for "THE SKYRIDER".

58. On September 3, 1981, without plaintiff's knowledge or consent, Peter Shukat purported to grant a written extension to LMN of one (1) further week to exercise of which LMN's its option for "THE SKYRIDER", in the absence option for "THE SKYRIDER" would have expired, with all rights thereunder reverting to plaintiff.

59. By his unauthorized agreement, purporting to extend LMN's option for "THE SKYRIDER", Peter Shukat knowingly violated his professional obligations to plaintiff and abused his positions of trust and confidence as plaintiff's own personal attorney. Peter Shukat, thereby, actively joined Marvel's conspiracy to deprive plaintiff of his rights in respect of "THE SKYRIDER".

60. As a result of the foregoing, plaintiff has been damaged by Peter Shukat's malfeasance as plaintiff's attorney, for which he is liable.

FOR A FIFTH CAUSE OF ACTION

61. Repeats and realleges each allegation of paragraphs 6 through 25, 27 through 35, 38, 39, and 42 through 44, 47 through 59, hereof.

62. On or about September 6, 1981, in order to attempt to further preserve the option to produce and participate in the revenues to be derived from "THE SKYRIDER", upon information and belief, Galton and Brodax, Marvel's behalf, and Dumler and Klein and Quiros, on LMN's behalf, without plaintiff's knowledge or consent, solicited Scott Shukat - as plaintiff's agent and manager - to grant LMN a further extension of its option to September 30, 1981.

63. On September 6, 1981, without plaintiff's knowledge or consent, Scott Shukat purported to grant a written extension to LMN for its option for "THE SKYRIDER", to September 30, 1981, in the absence of which LMN's option for "THE SKYRIDER" would have expired, with all rights thereunder reverting to plaintiff.

64. By his unauthorized agreement, purporting to extend LMN's option for "THE SKYRIDER", Scott Shukat, with the aid and advice of his brother, Peter Shukat, knowingly violated his obligations to plaintiff and breached his fiduciary duties as plaintiff's manager and agent. Scott Shukat, thereby, actively joined Marvel's conspiracy to deprive plaintiff of his rights in respect of "THE SKYRIDER".

65. As a result of the foregoing, plaintiff has been damaged by Scott Shukat's malfeasance as plaintiff's

agent and personal manager, for which Scott Shukat and The Shukat Company are liable to plaintiff.

FOR A SIXTH CAUSE OF ACTION

66. Repeats and realleges each allegation of paragraphs 6 through 25, 27 through 35, 38, 39, 42 through 44, 47 through 59 and 62 through 64, hereof.

67. In the additional time provided by the extensions of LMN's option granted by Peter and Scott Shukat, referred to above, Klein and Quiros apparently obtained sufficient monies to permit LMN to pay plaintiff the sums required to exercise its option to participate in plaintiff's production of "THE SKYRIDER", which they offered to pay on or about September 16, 1981.

68. In order to deceive and to further defraud plaintiff, Peter Shukat and Scott Shukat, falsely represented and affirmed to plaintiff that LMN had raised such monies before expiration of its option on September 5, 1981 and further advised plaintiff that LMN's offer of payment was valid and binding upon plaintiff under the terms of his agreements with LMN.

69. Plaintiff accepted LMN's payment, based wholly upon those misrepresentations by Peter and Scott Shukat, as aforesaid, on which he relied to his detriment.

70. As a result of the foregoing, plaintiff has been damaged by defendants' conspiracy to defraud and deceive him regarding their payments for "THE SKYRIDER", for which they are liable.

AS A SEVENTH CAUSE OF ACTION

71. Repeats and realleges each allegation of paragraphs 6 through 25, 27 through 35, 38, 39, 42 through 44, 47 through 59, and 62 through 64, hereof.

72. Upon information and belief, commencing at least as early as the Fall, 1981, Galton and Brodax, on Marvel's behalf, continued to meet with the other defendants, without plaintiff's knowledge or consent, in order to attempt to deprive plaintiff of his rights in respect of "THE SKYRIDER", in disregard of his copyrights and his contractual rights in respect of "THE SKYRIDER".

73. In January, 1982, with the approval of the other defendants, Marvel proposed to LMN a series of agreements regarding "THE SKYRIDER", pursuant to which Marvel proposed to produce and merchandize worldwide the project created by plaintiff.

74. Plaintiff continued to object to any involvement by Marvel in connection with "THE SKYRIDER", but was compelled to accept its proposals, by Peter Shukat, who advised plaintiff that he was obligated to do so under the Option Agreement with LMN. In order, however, to prevent any inferior production of "THE SKYRIDER" by Marvel or LMN, plaintiff continued as of right to insist upon a proper budget for the production of "THE SKYRIDER".

75. On or about February 8, 1982, after consulting with Scott Shukat and in reliance upon Peter Shukat's advice, plaintiff executed the Marvel agreements referred to above, on LMN's behalf, but placed in escrow all copies he signed, until his budgetary objections were

resolved to his satisfaction. The terms of the escrow agreement accepted by Peter Shukat provided that plaintiff's signatures be deemed ineffective until plaintiff's objections were resolved to plaintiff's satisfaction.

76. Without plaintiff's knowledge or consent, Peter Shukat breached his escrow agreement with plaintiff, by releasing to Dumler all copies of the Marvel agreements signed by plaintiff; and Dumler, thereafter, breached the escrow agreement by releasing to Marvel all copies of the agreements signed by plaintiff, notwithstanding his actual knowledge of plaintiff's restrictions upon any use by Marvel of those agreements until his objections to the budget were resolved to his satisfaction.

77. By their conduct, as aforesaid, Peter Shukat knowingly disregarded his duties to plaintiff in favor of Marvel, while Dumler continued to abuse his positions of trust and confidence with LMN, in favor of Marvel.

78. As a result of the foregoing, plaintiff has been damaged, for which defendants are liable.

EIGHT CAUSE OF ACTION

79. Repeats and realleges each allegation of paragraphs 6 through 25, 27 through 35, 38, 39, 42 through 44, 47 through 59, 62 through 64, and 72 through 77, hereof.

80. In reliance upon the expectation of the fulfillment of the object of their conspiracy, from February until November 1982, - when LMN's option for "THE SKYRIDER" expired and all rights therein reverted to plaintiff - defendants concealed from plaintiff all documents necessary for plaintiff to determine the status of plaintiff's

interests in "THE SKYRIDER", distorted the facts in that regard and purposely attempted to mislead plaintiff by false and contrived documentation.

81. By their conduct, as aforesaid, defendants breached the shareholders agreement and option agreement with plaintiff and LMN, and wrongfully deprived both plaintiff and LMN of the opportunity to sell "THE SKYRIDER" to anyone other than Marvel.

WHEREFORE, plaintiff demands judgment against defendants, jointly and severally, as follows:

I. On the FIRST CAUSE of ACTION, by virtue of Marvel's willful infringement of plaintiff's copyrights in respect of "THE SKYRIDER"

(a) Damages in that amount repeatedly proposed by Marvel for a budget for the production of "THE SKYRIDER", not less than Five Million (\$5,000,000) Dollars; and

(b) A formal accounting and complete disgorgement of all profits realized by Marvel or the other defendants, on "THE SKYRIDER" as well as the reasonable monetary value of all other benefits obtained; or

(c) Statutory damages of \$100,000.

II. On the SECOND CAUSE of ACTION, by virtue of defendant's malicious destruction of the entire value of plaintiff's copyrights in respect of "THE SKYRIDER", damages sufficient to compensate plaintiff for the loss of his project, in that amount which defendants have conceded to be its least value, not less than Eleven Million (\$11,000,000) Dollars.

III. On the THIRD CAUSE of MOTION by virtue of defendant's unauthorized use of plaintiff's name and reputation,

(a) Actual damages of Three Million (\$3,000,000) Dollars;

(b) Exemplary damages, in an amount sufficient to punish defendants and to deter any such future unlawful misconduct, not less than three-fold his actual damages sustained.

IV. On the FOURTH CAUSE of ACTION, by virtue of Peter Shukat's intentional breaches of his professional obligations as plaintiff's attorney, in violation of that trust and confidence reposed in him by plaintiff, actual damages of Two Million (\$2,000,000) Dollars.

V. On the FIFTH CAUSE of ACTION, by virtue of The Shukat Company's breach of its fiduciary duties to plaintiff as plaintiff's personal manager and agent, actual damages in an amount not less than Two Million (\$2,000,000) Dollars.

VI. On the SIXTH CAUSE of ACTION, by virtue of that fraud in respect of those payments to plaintiff by LMN in September, 1982, perpetrated by Dumler, Scott Shukat and Peter Shukat, actual damages for the resulting loss of the entire value of "THE SKYRIDER", in an amount not less than Eleven Million (\$11,000,000) Dollars,

VII. On the SEVENTH CAUSE of ACTION, by virtue of that knowing violation of plaintiff's escrow agreements with Peter Shukat and Dumler, actual damages in an amount not less than Eleven Million (\$11,000,000) Dollars, and

VIII. On the EIGHTH CAUSE of ACTION, by virtue of their breaches of contract, and wrongful inducements of such breaches, actual damages in an amount not less than Eleven Million (\$11,000,000) Dollars.

IX. On the FIRST, through the EIGHTH CAUSES of ACTION, all costs and disbursements of this action, reasonable attorneys fees, and such other relief as may be deemed appropriate.

Dated: New York, New York
December 29, 1982

LeFLORE and EGAN

By /s/ Ray L. LeFlore
RAY L. LeFLORE
(A Member Of The Firm)
Attorneys for Plaintiff,
Northern J. Calloway,
67 Wall Street
New York, New York 10005
(212) 422-2955

(Exhibits omitted in printing)

IN THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF
NEW YORK

_____	X
NORTHERN J. CALLOWAY,	:
individually and on behalf of	:
LMN PRODUCTIONS, INC.,	: AMENDED
Plaintiffs,	: COMPLAINT
-against-	: JURY TRIAL
	: DEMANDED
THE MARVEL ENTERTAIN-	: 82 Civ. 8697 (RWS)
MENT GROUP, a division of	:
CADENCE INDUSTRIES	:
CORPORATION, JAMES	:
GALTON, AL BRODAX,	:
MICHAEL S. KLEIN, LUIS	:
QUIROS, DUMLER & GIR-	:
OUX, THE SHUKAT COM-	:
PANY, LTD., SCOTT	:
SHUKAT, PETER S. SHUKAT,	:
ESQ. and, where necessary,	:
LMN PRODUCTIONS, INC.,	:
Defendants.	: X

Plaintiff, Northern J. Calloway ("Calloway"), by his attorneys, RAY L. LeFLORE, for his complaint herein, alleges as follows:

JURISDICTION

1. Jurisdiction of this action is founded upon:

(a) Title 17 of the United States Code, as amended, 17 U.S.C. Sections 101, *et. seq.*, entitled "Copyrights" (hereinafter "The Copyright Act of 1976").

(b) Section 1338 of the Judiciary Code, 28 U.S.C. § 1338, which confers exclusive jurisdiction upon the federal courts in copyright cases, along with original jurisdiction of any attendant claim of unfair competition;

(c) Sections 1331 and 1337, because of the Judiciary Code, 28 U.S.C. §§1331 and 1337, because the amount in controversy exceeds the sum of \$10,000, exclusive of interest and costs, and arises under the laws of the United States which regulate commerce; and

(d) principals of pendant jurisdiction in respect of those claims asserted, arising under state law.

THE PARTIES

2. Plaintiff is an individual and citizen of the United States, residing in the City, County and State of New York.

3. LMN Productions, Inc. ("LMN"), on whose behalf this action is brought derivatively, in part, is a New York corporation with offices in the City, County and State of New York. Since its formation, in 1981, plaintiff was and continues to be a shareholder of LMN.

4. Defendant, The Marvel Entertainment Group ("Marvel") is, upon information and belief, a division of Cadence Industries Corporation, a New Jersey corporation, with offices at 575 Madison Avenue, in the City, County and State of New York.

5. At all relevant times hereinafter, upon information and belief, defendant, James Galton ("Galton"), was an executive officer and authorized agent of Marvel. Each

action taken by Galton, as hereinafter alleged, was done as an agent of Marvel and on its behalf.

6. At all relevant times, upon information and belief, defendant, Al Brodax ("Brodax"), was an executive producer and authorized agent of Marvel. Each action taken by Brodax, as hereinafter alleged, was done as an agent of Marvel and on its behalf.

7. Upon information and belief, defendant, Michael B. Klein ("Klein") resides in the City, County and State of New York. At all relevant times hereinafter, Klein was an officer, director and shareholder of LMN.

8. Upon information and belief, defendant, Luis Quiros (Quiros"), resides in Larchmont, New York. At all relevant times, Quiros was an officer, director and shareholder of LMN.

9. Upon information and belief, defendant, Dumler & Giroux ("Dumler"), is a partnership of attorneys, engaged in the practice of law, with offices at 575 Madison Avenue, in the City, County and State of New York. From time to time, as hereinafter alleged, Dumler acted, or purported to act, as attorneys for LMN.

10. Upon information and belief, defendant, The Shukat Company, Ltd. ("The Shukat Company"), is a New York corporation. From time to time, as hereinafter alleged, The Shukat Company has acted, or purported to act, as plaintiff's personal manager in matters involving his artistic endeavors.

11. Upon information and belief, defendant, Scott Shukat, ("Shukat") is an individual with offices in the City, County and State of New York. At all relevant times

hereinafter, upon information and belief, Shukat was an officer and authorized agent of The Shukat Company.

12. Upon information and belief, defendant, Peter S. Shukat, Esq. ("Peter Shukat") is an attorney admitted to practice in New York, with offices in the City, County and State of New York. From time to time, as hereinafter alleged, Peter Shukat has acted, or purported to act, as plaintiff's attorney.

BACKGROUND

13. Plaintiff is "David of Sesame Street", a well recognized television personality for more than thirteen years. Sesame Street, and its characters, is one of the most watched shows in the television industry, seen daily by hundreds of millions of pre-school and elementary school children, both in the United States and in twenty-seven countries outside the United States.

14. Plaintiff has also performed on other day-time programs and starred in other made-for-TV children's specials, such as "Gordon" . . . Starring Northern J. Calloway, an NBC children's special, and other cultural programs such as "On Being Black", a TV mini-series produced by WGBH.

15. As a theatrical performer, plaintiff has had both starring and supporting roles in classical and contemporary theatre, including productions by, among others, The Lincoln Center Repertory Company, The Stratford Ontario Shakespeare Festival in Canada, The New York Shakespearean Festival under the direction of Joseph Papp, and The Circle in the Square; he has also appeared

in The Obie Award-winning off-Broadway production of *The Me Nobody Knows*, the off-Broadway production of *Salvation*, the Broadway and London productions of the Tony Award-winning *Pippin* (as the leading player), the Broadway production of the *Poison Tree*, the Broadway production of *Whose Life Is It Anyways?* (starring Mary Tyler Moore), and The New Federal Theatre production of *Louie*, as Louis Armstrong.

16. As a creative artist, plaintiff has written and produced five (5) pilot-scripts for television in conjunction with Ed Sullivan Productions, CBS, Paramount and NBC; written musicals for Broadway production, written motion-picture screen plays, created a series of highly successful children's books - "*Northern J. Calloway presents: I Been There*" and "*Northern J. Calloway presents: Supervroomer*" - and has conceived, written and produced two highly successful Sesame Street albums for CTW's Children's Record Production Company - "*David's Daydreamin' on a Rainy Day*" and "*The Sesame Street Block Party*". To his credit, plaintiff has five (5) participating Emmy Awards, one (1) individual Emmy Award, four (4) participating Grammy Awards, a Circle Critic's Award and numerous other testimonials to his artistic accomplishments.

17. In 1979, as a natural extension of his involvement in quality children's programming, plaintiff conceived and developed that motion picture project, tentatively entitled "*THE SKYRIDER*", consistent with his image as "David of Sesame Street". Thereafter, in consultation with David Steven Roth, plaintiff wrote and caused to be written a formal synopsis, outline and script for "*THE SKYRIDER*", as a feature-length science fiction

musical, with state of the art computerized animation, for children and family entertainment. Because the story and characters created by plaintiff are both heroic and futuristic, plaintiff's creations in "THE SKYRIDER" were also intended as an additional source of revenues from merchandizing and licensing in the children's market.

18. The synopsis, outline and script for "THE SKYRIDER" contain a substantial amount of material wholly original, constituting a copyrightable work under the laws of the United States. In order to resolve any question concerning ownership of "THE SKYRIDER", plaintiff and Roth entered into a written agreement confirming (i) that Roth was employed by plaintiff to work for hire on "THE SKYRIDER", and (ii) that all right, title and interest in respect of "THE SKYRIDER" are vested in plaintiff.

19. Since 1979, plaintiff has complied in all respects with The Copyright Act of 1976, securing all exclusive rights and privileges in and to the copyright of such work; since November 2, 1981, all copies of plaintiff's script for "THE SKYRIDER" have provided notice of such copyright, stated as follows:

- (c) 1981 Northern J. Calloway,
David Stephen Roth
(Script)
- (c) 1981 Northern J. Calloway
(Lyrics)

Copies of plaintiff's Synopsis, Outline and Script (with notice of copyright) for "THE SKYRIDER" are annexed as Exhibit A.

20. As a prerequisite to this action, plaintiff has caused his script for "THE SKYRIDER" to be registered

with the United States Register of Copyrights, effective July 26, 1982, with plaintiff identified as the sole owner of "THE SKYRIDER"; plaintiff has since received from the Register of Copyrights a certificate of registration, dated and identified as follows: "July 26, 1982; No. PAU 423-282". A true copy of plaintiff's certificate of copyright registration is annexed as Exhibit B.

FOR A FIRST CAUSE OF ACTION

21. Repeats and realleges each allegation of paragraphs 1 through 20, hereof.

22. Plaintiff engaged Klein and Quiros in January 1981, to assist in the financing of his production of "THE SKYRIDER", based upon Klein's and Quiros' representations that, through their respective connections, they could secure all monies required to complete his production of "THE SKYRIDER". By then, plaintiff's project was fully developed, at plaintiff's expense, with illustrations, songs, a highly developed marketing plan and a preliminary budget for the proposed project.

23. In the ensuing weeks, plaintiff presented "THE SKYRIDER" to numerous individuals, introduced by Klein and Quiros, in a position to finance in whole, or in part, plaintiff's intended production of "THE SKYRIDER". Without exception, each person introduced to plaintiff by Klein and Quiros evidenced a serious interest in financing or otherwise participating in the project.

24. In March and April 1981, at a series of meetings in New York arranged by Klein and Quiros, plaintiff presented "THE SKYRIDER" to Marvel by displaying and

delivering copies of his works and disclosing all other commercial aspects of "THE SKYRIDER".

25. Galton and Brodax, on Marvel's behalf, proclaimed the project a capital success, both as a promising candidate for "box-office" receipts and profitable merchandizing for Marvel, and as a prime opportunity for exploitation by Marvel's world-wide publishing operations, particularly in its comic books, comic strips and costumed-character licensing. Galton and Brodax proposed to complete the production of "THE SKYRIDER", with Marvel as "producer", for a budget of five million (\$5,000,000) dollars, subject to Marvel's full and complete control of its budget and artistic content.

26. What Marvel proposed for the production of "THE SKYRIDER", as "producer", was beyond the role intended for it as a "production house" or jobber, and unacceptable to plaintiff. Plaintiff, therefore, ceased all further negotiations with Marvel.

27. Galton and Brodax refused to accede to plaintiff's rejection of Marvel's overtures in respect of "THE SKYRIDER" and, thereafter, without plaintiff's knowledge or consent, upon information and belief, continued to meet and otherwise communicate with Klein and Quiros concerning "THE SKYRIDER". In April 1981, with Klein's and Quiros' active participation, upon information and belief, Galton and Brodax embarked upon a scheme and course of conduct designed to misappropriate and use for their own business purposes the characters and general plot of "THE SKYRIDER", as well as the marketing concepts developed by plaintiff.

28. In furtherance of their scheme as aforesaid, without plaintiff's knowledge or consent, on and after November 3, 1981, Galton and Brodax, with Klein's and Quiros' active participation, wrote and caused to be written a work, entitled "SY RYDER", copied in large part from plaintiff's copyrighted works, using the characters and format of "THE SKYRIDER".

29. Marvel's infringing work changed substantially the premise and focus of plaintiff's copyrighted works:

- Where plaintiff's concept of "THE SKYRIDER" was consistent with his dedication to quality children's programming, Marvel distributed an outline which publicized "SY RYDER" as a picture "designed to enthrall the pubescent to the senile";

- Where plaintiff purposefully avoided in "THE SKYRIDER" any reference to the worldly-realities of day-to-day existence on the planet Earth, Marvel distributed a derivation of plaintiff's works for a movie entitled "SY RYDER" which appeared to base their protagonists's "escape" into fantasy upon the inanity of his routine as a motorman on the 8th Avenue Line";

- Where plaintiff sought to create a futuristic model in "THE SKYRIDER" Marvel distributed an outline with a premise for "SY RYDER" which stressed "the surreal scamper that takes Sy . . . to his well-neglected Columbia Heights apartment . . . [where] there are gunshots, sirens, screams, falling bodies to avoid [and] a variety of street proposals to avoid . . . ;"

- Where plaintiff made his characters heroic and larger than life in "THE SKYRIDER", Marvel distributed an outline of "SY RYDER" which resorted to characters like the "excitable, strange-eyed, platinum-haired black man", wearing a "newly acquired pinky ring", and "Lucullus, his woman";

- Where plaintiff sought to create with "THE SKY-RIDER" a motion picture for children and family entertainment, Marvel distributed an outline for "SY RYDER" replete with distasteful allusions to "cock-roaches", "toilet[s] on the BMT", "indigestion", "mayhem" and "sludge".

A copy of Marvel's infringing work (hereinafter "Marvel's Outline") is annexed as Exhibit C.

30. Marvel's outline distorted plaintiff's original artistic creation by interjecting extraneous characters and offensive language, causing the work as a whole to be demeaned and cheapened.

31. No part of Marvel's outline was approved or authorized by plaintiff.

32. At least since April 12, 1982, continuing to the date hereof, upon information and belief, Galton and Brodax and Klein and Quiros have caused Marvel's outline to be displayed to the public without plaintiff's knowledge or consent, and caused its infringing outline to be distributed throughout the entertainment industry and in the financial community involved with such projects, for their own business purposes.

33. In the period set forth above, upon information and belief, Marvel's outline has been personally displayed and distributed by the aforesaid defendants' to each of the following persons, and others, within the United States:

- (i) Michael Eichner
CBS Records
51 West 52nd Street
New York, New York 10019

- (ii) Bud Monasch
Twentieth Century Fox
P.O. Box 900
Beverly Hills, CA 90213
- (iii) Nigel K. Denscombe
Regional Director West
Investment Banking Group
Bank of America
Bank of America Center
San Francisco, CA 94137
- (iv) Peter M. Elrick
Earl Elrick
Allen & Company, Inc.
711 Fifth Avenue
New York, New York
- (v) Frank Price
Columbia Pictures
Burbank, California
- (vi) Holger Kral Wrede
International Television
919 Third Avenue
New York, New York
- (vii) James Komak
Producer
[Chico and The Man] ¹
617 North Beverly Drive
Beverly Hills, California
- (viii) Mary Lou Thomas
HBO
Time & Life Building
New York, New York 10020

34. The individuals listed above and their related companies are some of the most significant sources within the United States for financing or otherwise ensuring the success of major motion picture projects.

35. Defendants' unauthorized creation, display and distribution of "SY RYDER", as aforesaid, have so confused their own work with "THE SKYRIDER" that it ("THE SKYRIDER") can no longer be sold on its own merit as a motion picture project for children and family entertainment, or promoted as a suitable subject for merchandizing in the children's market.

36. By their conduct, as aforesaid, Marvel, Galton, Brodax, Klein and Quiros have maliciously destroyed and taken from plaintiff the entire value of his copyright in respect of "THE SKYRIDER", unlawfully infringed plaintiff's copyright in respect of "THE SKYRIDER" and competed unfairly with plaintiff, in violation of the Copyright Act of 1976, for which they are liable to plaintiff in an amount not less than ELEVEN MILLION (\$11,000,000) DOLLARS.

FOR A SECOND CAUSE OF ACTION

37. Repeats and realleges each allegation of paragraphs 1 through 20, and 22 through 35, hereof.

38. In every regard where plaintiff's copyrighted work was altered by Marvel's outline, the language and scene depictions interjected in Marvel's outline are offensive to plaintiff because of their vulgar references and stereotypical appeal, and entirely inconsistent with plaintiff's original conception and copyright in respect of "THE SKYRIDER".

39. As an integral part of their unlawful distribution of "SY RYDER" as a distortion of plaintiff's copyrighted materials, defendants used plaintiff's name and

business reputation without plaintiff's knowledge or consent, in a manner seriously detrimental to his image, his career, his standing in the black community, and his reputation in the field of quality children's programming and in the entertainment industry, generally.

40. By their conduct, as aforesaid, Marvel, Galton, Brodax, Klein and Quiros have effectively foreclosed plaintiff from ever credibly denying his affiliation with "SY RYDER" or taking credit for "THE SKYRIDER" as plaintiff conceived and developed it, and have irreparably damaged plaintiff's name and business reputation.

41. As a result of the foregoing, Marvel, Galton, Brodax, Klein and Quiros have knowingly invaded plaintiff's rights of privacy in violation of the New York Civil Rights Act, defamed plaintiff's name and business reputation and violated The Copyright Act of 1976, for which they are liable to plaintiff in an amount not less than THREE MILLION (\$3,000,000) DOLLARS.

FOR A THIRD CAUSE OF ACTION

42. Repeats and realleges each allegation of paragraphs 1 through 20, 22 through 35, 38, 39, and 40, hereof.

43. As shown below, Dumler, The Shukat Company, Scott Shukat and Peter Shukat knowingly aided and abetted the other defendants' infringements of plaintiff's rights in respect of "THE SKYRIDER", competed unfairly with plaintiff, unlawfully conspired, for their own business purposes, with Marvel, Galton, Brodax, Klein and Quiros to misappropriate "THE SKYRIDER", and made possible the unauthorized use of plaintiff's name and

reputation in conjunction with Marvel's infringing outline.

44. On or about June 8, 1981, while Klein and Quiros continued to meet with Galton and Brodax without plaintiff's knowledge or consent, plaintiff and Klein and Quiros entered into a series of agreements, which plaintiff signed and initialed, memorializing their respective rights in connection with plaintiff's intended production of the "THE SKYRIDER".

45. Upon information and belief, the agreements referred to above granted, among other things, a limited option, upon stated conditions, for Klein and Quiros to participate in the movie "THE SKYRIDER". The agreements reserved to plaintiff the right to make all artistic decisions concerning "THE SKYRIDER", as well as the right to determine which animation houses to use and who would direct the motion picture.

46. Upon information and belief, Klein and Quiros never intended to abide by the terms and conditions of their contracts with plaintiff, to which they agreed. Instead, upon information and belief, at Marvel's suggestion, Klein and Quiros purported to retain Dumler to further their scheme to misappropriate "THE SKYRIDER" by evading their agreements with plaintiff.

47. Upon information and belief, Dumler agreed to assist Klein and Quiros with knowledge of their scheme, as aforesaid, on or about June 9, 1981 and, thereafter, aided and abetted Marvel, Galton, Brodax, Klein and Quiros in their unlawful misappropriation of "THE SKYRIDER".

48. In furtherance of their scheme, as aforesaid, upon information and belief, on or about June 9, 1981, Dumler solicited Scott Shukat to cause The Shukat Company to purport to grant an option for "THE SKYRIDER", on terms and conditions substantially different from plaintiff's agreements dated June 8, 1981. The Shukat Company was then plaintiff's manager, retained to advise him in all regards concerning "THE SKYRIDER".

49. On June 9, 1981, without plaintiff's knowledge or consent, Shukat and his company purported to grant to LMN an option to acquire "THE SKYRIDER", on terms and conditions substantially different from plaintiff's agreements dated June 8, 1981. A copy of Shukat's unauthorized letter-agreement is attached as Exhibit D.

50. Neither Shukat nor The Shukat Company had any authority whatsoever to purport to grant the aforesaid option, and did so in blatant contradiction of their respective fiduciary duties to plaintiff. Upon information and belief, Scott Shukat and The Shukat Company thereby joined Marvel, Galton, Brodax, Klein, Quiros and Dumler in their unlawful scheme, as aforesaid, to misappropriate "THE SKYRIDER", with knowledge of their unlawful purposes in that regard.

51. In furtherance of their scheme, as aforesaid, at Marvel's behest, Klein, Quiros and Dumler, upon information and belief, on or about August 5, 1981, solicited Peter Shukat to assist in their misappropriation of plaintiff's rights in respect of "THE SKYRIDER". Peter Shukat was then plaintiff's attorney, retained to advise plaintiff regarding "THE SKYRIDER".

52. On or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, back-dated to June 8, 1981, purporting to confirm by formal agreement the terms and conditions of a putative option for LMN to acquire "THE SKYRIDER".

53. Peter Shukat had no authority whatsoever to purport to affix plaintiff's signature to said documents, and did so in blatant contradiction of his fiduciary duties and obligations to plaintiff.

54. On September 3, 1981, September 6, 1981, September 14, 1981, and September 15, 1981, upon information and belief, in furtherance of their scheme, as aforesaid, Klein, Quiros, Dumler, Scott Shukat and Peter Shukat together negotiated, drafted and purported to execute on plaintiff's behalf another series of agreements, purporting to grant to LMN and others additional rights in respect of "THE SKYRIDER".

55. Plaintiff did not know or approve of the agreements referred to above, and never authorized anyone to purport to sign such agreements on his behalf.

56. When plaintiff affixed formal notice of his copyright to his script for "THE SKYRIDER", and caused it to be delivered to Klein and Quiros and Dumler and Shukat, on or about November 2, 1981, plaintiff did not know that a series of false and deceptive agreements had been created by defendants, purporting to grant to themselves and to others fictitious rights in respect of "THE SKYRIDER".

57. Defendants also concealed Marvel's outline from plaintiff and affirmatively misrepresented the facts in respect of their unlawful display and distribution of "THE SKYRIDER".

58. In November and December, 1981, Scott Shukat, upon information and belief, then directly contributed to Marvel's creation of its infringing outline for "SY RYDER"; Dumler, Scott Shukat, The Shukat Company and Peter Shukat made possible the use of plaintiff's name and reputation without his consent in conjunction with Marvel's outline.

59. In February 1982, plaintiff still knew nothing of defendants' steps to misappropriate "THE SKYRIDER" when Marvel again proposed to plaintiff that it produce "THE SKYRIDER". Plaintiff continued to express substantial objection to any participation by Marvel in his production of "THE SKYRIDER".

60. After consulting with Scott Shukat and in reliance upon Peter Shukat's advice, on February 8, 1982, plaintiff agreed to execute a series of agreements with Marvel pursuant to which Marvel would produce and merchandize world-wide the project created by plaintiff. In order to ensure that all objections by plaintiff to Marvel's involvement in the project were entirely resolved before the agreements became effective, plaintiff instructed Peter Shukat to hold the Marvel's agreements in escrow until plaintiff released them.

61. On February 8, 1982, plaintiff executed the Marvel agreements and placed in escrow with Peter Shukat all copies of the agreements signed by him.

62. The terms of the escrow agreement accepted by Peter Shukat provided that plaintiff's signature not be deemed effective unless and until plaintiff's continuing objections to Marvel's involvement were resolved to plaintiff's satisfaction.

63. On or about February 8, 1982, in furtherance of their scheme as aforesaid, without plaintiff's knowledge or consent, Peter Shukat released to Dumler all copies of the Marvel agreements signed by plaintiff. Upon information and belief, Dumler accepted the Marvel agreements with plaintiff's signature upon the express undertaking that Dumler would honor and abide by plaintiff's escrow agreement with Peter Shukat.

64. In furtherance of their scheme, as aforesaid, without plaintiff's knowledge or consent, on or about February 9, 1982, Dumler released to Marvel all copies of the agreements signed by plaintiff Marvel, thereafter, used the agreements signed by plaintiff in conjunction with defendants' display and distribution of Marvel's outline for its own business purposes, and used the agreements to attempt to create an appearance of propriety for their misappropriation of "THE SKYRIDER".

65. Peter Shukat and Dumler had actual knowledge of plaintiff's restrictions upon his signature, and both were bound by their escrow agreements with plaintiff; Dumler and Peter Shukat breached their respective escrow agreements in order to further defendants' scheme to misappropriate "THE SKYRIDER".

66. From February 1982 through November 1982, defendants continued to conceal from plaintiff the aforementioned documents and all other information necessary for plaintiff to ascertain defendants' efforts to misappropriate "THE SKYRIDER", maliciously distorted the facts in that regard and purposely attempted to mislead plaintiff by false and contrived documentation all in furtherance of their scheme to misappropriate "THE SKYRIDER".

67. By their conduct, as aforesaid, each defendant aided and abetted Marvel's infringements of plaintiff's copyrights, unfairly competed with plaintiff and conspired between and among themselves to misappropriate "THE SKYRIDER".

68. As a result of the foregoing, all defendants have violated the Copyright Act of 1976, for which they are liable to plaintiff in an amount not less than ELEVEN MILLION (\$11,000,000) DOLLARS.

FOR A FOURTH CAUSE OF ACTION

69. Repeats and realleges each allegation of paragraphs 1 through 20, 22 through 35, 38 through 40 and 43 through 67, hereof.

70. Defendants' unlawful infringements of plaintiff's copyright in respect of "THE SKYRIDER", their wrongful misappropriation of his property and their slander and defamation of plaintiff and his business reputation, all as aforesaid, were knowing, willful and malicious, without regard to his rights as an artist and

copyright owner, entitling plaintiff to exemplary damages in an amount sufficient to punish defendants and to deter such future misconduct, but not less than three-fold his actual damages, for which Marvel, Galton, Brodax, Klein, Quiros, Dumler, The Shukat Company, Scott Shukat and Peter Shukat are liable.

FOR A FIFTH CAUSE OF ACTION

71. Repeats and realleges each allegation of paragraphs 1 through 20, 22 through 35, 38 through 40 and 43 through 67, hereof.

72. By his conduct, as aforesaid, Peter Shukat knowingly violated his professional obligations to plaintiff and abused his positions of trust and confidence as plaintiff's own personal attorney, causing great and substantial injury to plaintiff, for which Peter Shukat is liable to plaintiff in an amount not less than ELEVEN MILLION (\$11,000,000) DOLLARS.

FOR A SIXTH CAUSE OF ACTION

73. Repeats and realleges each allegation of paragraphs 1 through 20, 22 through 35, 38 through 40 and 43 through 67, hereof.

74. By their conduct as aforesaid, The Shukat Company and Scott Shukat knowingly violated their obligations to plaintiff and breached their fiduciary duties as plaintiff's personal managers, causing great and substantial injury to plaintiff, for which The Shukat Company and Scott Shukat are liable to plaintiff in an amount not less than ELEVEN MILLION (\$11,000,000) DOLLARS.

FOR A SEVENTH CAUSE OF ACTION

75. Repeats and realleges each allegation of paragraphs 1 through 20, 22 through 35, 38 through 40 and 43 through 67, hereof.

76. Upon information and belief, LMN was formed on or about March 27, 1981, for the single purpose of serving as a vehicle for the financing and marketing of plaintiff's contemplated production of that motion picture, tentatively entitled "THE SKYRIDER". Upon information and belief, plaintiff's agreements, dated June 8, 1981, granted to LMN a valuable option, upon stated conditions, to share in the profits and royalties to be derived from "THE SKYRIDER".

77. In August and September of 1981, LMN successfully raised, and thereafter received, in excess of seventy-five thousand (\$75,000) dollars, the sum required by its agreements with plaintiff to fund the pre-production expenses of the project. Thereafter, upon information and belief, upon the strength of "THE SKYRIDER", LMN secured both a guarantee of production and a commitment to fund the production of "THE SKYRIDER" in separate amounts of at least five million (\$5,000,000) dollars.

78. Upon information and belief, all defendants had actual knowledge of the terms of all agreements between LMN and plaintiff concerning "THE SKYRIDER" and knew the value of LMN's property rights in that regard. Defendants, nevertheless, unjustifiably interfered with LMN's contractual rights, with knowledge of its contractual relationships with plaintiff, when they created, displayed and distributed Marvel's outline and, thereby,

maliciously destroyed and took from LMN the entire value of its contracts with plaintiff in respect of "THE SKYRIDER".

79. As a result of the foregoing, LMN has been damaged, for which all defendants are liable, in an amount not less than FIVE MILLION (\$5,000,000) DOLLARS.

FOR AN EIGHTH CAUSE OF ACTION

80. Repeats and realleges each allegation of paragraphs 42 through 67, hereof.

81. By their conduct, Klein, Quiros and Dumler violated their obligations to LMN and breached their fiduciary duties as attorneys for, and officers and directors of, LMN, respectively.

82. As a result of the foregoing, LMN has been damaged, for which Klein, Quiros and Dumler are liable, in an amount not less than FIVE MILLION (\$5,000,000) DOLLARS.

FOR A NINTH CAUSE OF ACTION

83. Repeats and realleges each allegation of paragraphs 42 through 67, hereof.

84. Upon information and belief, Klein and Quiros, with Dumler's assistance, also misappropriated substantial funds belonging to LMN, which funds were expressly dedicated to the completion of the motion picture project, tentatively entitled "THE SKYRIDER".

85. Despite plaintiff's protests and demands, Klein and Quiros have failed and refused to account to, or reimburse, LMN for those monies wrongfully taken for their own use on extravagant personal items, personal trips and insurance policies entirely inconsistent with the purposes set forth in LMN's agreements with those who invested in the motion picture project, tentatively entitled "THE SKYRIDER".

86. By their waste and misappropriation of LMN's corporate funds, Klein and Quiros depleted the assets of LMN and, thereby, effectively foreclosed LMN from ever completing the motion picture project, tentatively entitled "THE SKYRIDER".

87. As a result of the foregoing, LMN has been damaged in an amount not now capable of determination, for which Klein, Quiros and Dumler are liable to LMN.

WHEREFORE, plaintiff demands judgment against defendants, as follows:

I. On the FIRST CAUSE OF ACTION, against Marvel, Galton, Brodax, Klein and Quiros jointly and severally,

- (a) Damages in an amount not less than ELEVEN MILLION (\$11,000,000) DOLLARS;
- (b) A formal accounting and complete disgorgement of all profits realized by these defendants as a result of their infringements, and the reasonable monetary value of all other benefits obtained;
- (c) Statutory damages of \$100,000; and
- (d) An injunction, permanently barring all future unauthorized uses of plaintiff's works.

II. On the SECOND CAUSE OF ACTION against Marvel, Galton, Brodax, Klein and Quiros' jointly and severally,

- (a) Actual damages of THREE MILLION (\$3,000,000) DOLLARS;
- (b) Exemplary damages, in an amount sufficient to punish defendants and to deter any such future unlawful misconduct, not less than three-fold his actual damages sustained; and
- (c) An injunction, permanently barring all future unauthorized uses of plaintiff's name or business reputation.

(III) On the THIRD CAUSE OF ACTION, against all defendants, jointly and severally,

- (a) Damages in an amount not less than ELEVEN MILLION (\$11,000,000) DOLLARS;
- (b) A formal accounting and complete disgorgement of all profits realized by these defendants as a result of their infringements, the reasonable monetary value of all other benefits obtained;
- (c) Statutory damages of \$100,000; and
- (d) An injunction, permanently barring all future unauthorized uses of plaintiff's works or name or business reputation.

(IV) On the FOURTH CAUSE OF ACTION, against all defendants, jointly and severally, punitive and exemplary damages not less than THIRTY-THREE MILLION (\$33,000,000) DOLLARS.

(V) On the FIFTH CAUSE OF ACTION, against Peter Shukat, actual damages of ELEVEN MILLION (\$11,000,000) DOLLARS.

(VI) On the SIXTH CAUSE OF ACTION, against Scott Shukat and The Shukat Company, actual damages in an amount not less than ELEVEN MILLION (\$11,000,000) DOLLARS.

(VII) On the SEVENTH CAUSE OF ACTION, on LMN's behalf, against all other defendants herein, jointly and severally, actual damages in an amount not less than FIVE MILLION (\$5,000,000) DOLLARS.

(VIII) On the EIGHTH CAUSE OF ACTION, on LMN's behalf, against Klein, Quiros, and Dumler, by virtue of their breaches of their fiduciary duties to LMN, actual damages in an amount not less than FIVE MILLION (\$5,000,000) DOLLARS.

(IX) On the NINTH CAUSE OF ACTION, on LMN's behalf, against Klein, Quiros and Dumler, jointly and severally, an order directing a formal accounting and the return to LMN of all monies improperly spent.

(X) On the FIRST through the NINTH CAUSES OF ACTION, all costs and disbursements of this action, reasonable attorneys fees, and such other relief as may be deemed just and appropriate.

Dated: New York, New York
July 29, 1983

RAY L. LeFLORE
/s/ Ray L. LeFlore
(A Member of the Firm)
Attorneys for Plaintiff,
Northern J. Calloway,
67 Wall Street
New York, New York 10005
(212) 422-2955

(Exhibits omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

	X
NORTHERN J. CALLOWAY,	:
individually	:
and on behalf of LMN PRO-	:
DUCTIONS, INC.,	: 82 Civ. 8697 (RWS)
Plaintiffs,	:
	: AFFIDAVIT
-against-	:
THE MARVEL ENTERTAIN-	:
MENT GROUP, a division of	:
CADENCE INDUSTRIES COR-	:
PORATION, JAMES GALTON,	:
AL BRODAX, MICHAEL S.	:
KLEIN, LUIS QUIROS,	:
DUMLER & GIROUX, THE	:
SHUKAT COMPANY, LTD.,	:
SCOTT SHUKAT, PETER S.	:
SHUKAT, ESQ. and, where nec-	:
essary, LMN PRODUCTIONS,	:
INC.,	:
Defendants.	X

Northern J. Calloway, being duly sworn, deposes and says:

1. I am the plaintiff in this action in which defendants are charged with direct infringements of my copyright, and other violations of my rights, in respect of that motion picture project, tentatively entitled "The Sky rider".

2. I was personally involved in all honest and proper transactions affecting "The Sky rider" alleged in this action, and make this affidavit: (i) in further support of the Amended Complaint, which defendants again seek

to dismiss; and (ii) in opposition to defendant's motions for summary judgment; and (iii) in support of my cross-motion for partial summary judgment against defendants, The Marvel Entertainment Group, a division of Cadence Industries Corporation ("Marvel") and James Galton ("Galton"), Al Brodax and Michael S. Klein ("Klein"), based upon their admitted infringements of my rights in respect of "The Sky rider".

3. Before restating the facts not in dispute - which both preclude defendants' motions for summary judgment and require judgment against Marvel, Galton, Brodax and Klein - their motions and mine must be placed in the context of prior proceedings in this action.

I. THE FACTS IN DISPUTE PRECLUDE
SUMMARY JUDGMENT FOR DEFENDANTS.

4. The original complaint in this action was filed on or about December 29, 1982, more than 15 months ago. It charged Galton, Brodax, Marvel, Klein and Luis Quiros ("Quiros") with direct infringements of my copyright for the script for "The Sky rider" project, and charged the other defendants with various breaches of their fiduciary duties to me and LMN Productions, Inc. ("LMN"), without which their co-defendants could not have infringed my copyright or successfully misappropriated The Sky rider project.

5. The original complaint was dismissed, on various motions by defendants, because this Court held it failed to comply with Rule 8 of The Federal Rules of Civil Procedure.

6. On July 29, 1983, I caused my Amended Complaint in this action to be served in accordance with this Court's order dismissing the original complaint. The Amended Complaint alleged the same operative facts as the original complaint - viz., Marvel's preparation of a derivative work based in large part on my script for "The Skyrider", and Marvel's display through-out the entertainment industry of that infringing work in cooperation with Klein and Quiros, among others. However, I did not refer to, or annex, those documents which, I learned in the interim, had been contrived and forged by defendants. Instead, the Amended Complaint charged:

"52. On or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, backdated to June 8, 1981, purporting to confirm by formal agreement the terms and conditions of a putative option for LMN to acquire "The Skyrider."

The documents referred to above, which I believe Peter Shukat contrived (and others perhaps forged) while he was my attorney and trusted advisor, are: the option agreement, the writers agreement and the composition agreement, all dated June 8, 1981, annexed to the original complaint as the second, third and fourth documents, respectively, comprising Exhibit C.

7. Based upon my review of the originals of these three documents, produced in other proceedings, I hereby reaffirm that I neither signed nor approved those agreements. Defendants should not, I submit, be entitled to claim reliance upon documents which I now know were forged and contrived to deceive.

8. Unless, and until, defendants produce for this Court the agreements I actually "signed and initialed" on or about June 8, 1981 (see Amended Complaint ¶44), all copies of which I entrusted to Peter Shukat, or (ii) attest that the documents on which they purport to rely were "executed" by me on or about August 5, 1981* and are authentic, LMN remains a stranger "The Skyrider". Moreover, since Marvel, Galton and Brodax are even further removed from "The Skyrider" than LMN, it is clear that they could not acquire any rights regarding "The Skyrider", as a result of defendants' forgeries in August, 1981.

9. The only other agreements involved in this action, on which defendants purport to rely, are those agreements described in the Amended Complaint, at paragraphs 59 - 61, which I placed in escrow with Peter Shukat and never released.

10. The Amended Complaint states:

"59. In February 1982, plaintiff still knew nothing of defendants' steps to misappropriate "The Skyrider" when Marvel again proposed to plaintiff that it produce "The Skyrider". Plaintiff continued to express substantial objection to any participation by Marvel in his production of "The Skyrider".

*There is no question that I executed a second Shareholders Agreement on August 5, 1981, in the mistaken belief that it duplicated the Shareholders Agreement I signed in June, 1981. The Shareholders Agreement, however, grants nothing to defendants respecting "The Skyrider"; it merely defined the shareholders relationship *inter se*, should LMN ever acquire an option for, or produce, "The Skyrider" movie.

"60. After consulting with Scott Shukat and in reliance upon Peter Shukat's advice, on February 8, 1982, plaintiff agreed to execute a series of agreements with Marvel pursuant to which Marvel would produce and merchandize world-wide the project created by plaintiff. In order to ensure that all objections by plaintiff to Marvel's involvement in the project were entirely resolved before the agreements became effective, plaintiff instructed Peter Shukat to hold the Marvel's agreements in escrow until plaintiff released them.

"61. On February 8, 1982, plaintiff executed the Marvel agreements and placed in escrow with Peter Shukat all copies of the agreements signed by him."

As I never authorized the release of these documents from escrow, because my objections were never met, neither Marvel nor LMN can now purport to rely upon them.

11. Finally, by way of introduction to the chronology of facts set forth below, it is clear that - even now, in this federal action defendants still seek to deceive the Court and distort and cover up the relevant facts in order to attempt to avoid their manifest liability.

II. THE UNCONTROVERTABLE DOCUMENTS DEMONSTRATE DEFENDANT'S CONTINUING DECEPTION

12. The Affidavit of James E. Galton, sworn to February 1, 1984, submitted in support of Marvel's motion for summary judgment, states:

"18. Until I was served in this action, I never saw the first instrument annexed to the original complaint as

Exhibit C nor was I ever advised of its existence or contents. I know of no person employed by or acting on behalf of Marvel who ever saw or was aware of the contents of that instrument and there is no indication whatever in the Marvel files regarding The Skyrider that anyone employed by or acting for Marvel was aware of the agreement or that the agreement was ever requested or that the agreement was ever received by Marvel."

13. For the same apparent purpose, the Affidavit of Al Brodax, sworn to February 1, 1981, also submitted in support of his motion for summary judgment, states:

"16. I am advised that in November 1981, pursuant to the request of Marvel, LMN furnished to Marvel an agreement in writing pursuant to which Calloway and Spencer transferred all rights in The Skyrider to LMN. I am advised that the agreement received by Marvel is the same agreement as is attached to the original complaint as the second instrument comprising Exhibit C. I never saw that agreement prior to the time that I was served in this action, and I never saw the first instrument annexed to the original complaint as Exhibit C nor was I ever advised of its contents."

14. Both these assertions are patent untruths, as the documents I have discovered in the course of this action confirm that Marvel was provided copies of all relevant documents - including the Shareholders Agreement - before Marvel or Galton or Brodax assert they displayed and distributed Marvel's infringing outline. Exhibit 1, annexed hereto, is a letter from Quiros to Brodax, dated January 7, 1982. It states:

"Dear Al:

As per our conversation, enclosed please find all contracts that will be made available to the potential English investors:

1. LMN Stockholders Agreement.
2. Master Document - Option Agreement.
3. Writers Agreement - Exhibit A (I am presently waiting for additional copies of this agreement from Egon Dumler).
4. Publishers Agreement - Exhibit B
5. Front Money Agreement \$50,000 Mr. Frascella
6. Front Money Agreement \$25,000 Ms. Lagronegro (I am presently waiting for additional copies of this agreement from Egon Dumler.)

It will be important for you to fully understand these contracts. Some of the questions I can help you with. However, I would prefer you ask Egon, or Alice.

* * *

Sincerely,

Louis Quiros" [Emphasis added]

The first enclosure listed in Quiros' letter is the Shareholders Agreement which Brodax now denies he received. Moreover, the reference above to "Alice", presumably Alice Donenfeld, Marvel's Vice President, Business Affairs, leaves no doubt that others at Marvel were already fully familiar with all the "agreements" sent to Brodax on January 7, 1982.

III. Defendants' Admissions Clearly Establish Copyright Infringement

15. Galton and Brodax also make it appear that they never saw my script for "The Sky rider", on which I placed a statutory notice of copyright before its delivery

to Klein and Quiros via Egon Dumler, on or about November 2, 1981. Galton's affidavit states:

"19. The material appearing in Exhibit C to the Amended Complaint emanated from the sources set forth by Brodax in his affidavit at paragraph 20 thereof. I agreed that Marvel would put together the material for the presentation."

The Affidavit of Brodax, to which Galton refers, then states:

"17. In November or December of 1981, LMN through either Klein or Quiros requested that I prepare material with respect to The Sky rider which might make it more interesting or saleable to prospective investors. Mr. Galton asked me if I could prepare such material, which I agreed to do. At or about the same time, I received a copy of The Sky rider "Synopsis" which appears as the first of three instruments annexed to the Amended Complaint as Exhibit A, so that I would have something to work with in preparing the requested material.

"18. It is my best recollection that that is the first time that I ever saw any written material with respect to The Sky rider and that I never saw The Sky rider "Screenplay Outline" until it appeared as the second instrument annexed to the original complaint as Exhibit A. I never saw the extended Sky rider screenplay until it appeared as the third instrument annexed to the Amended Complaint as Exhibit A."

16. The synopsis is the only material acknowledged as the basis for Marvel's derivative outline. Both Galton and Brodax apparently assume that this Court is unfamiliar with the documents before it, as it is clear from the most cursory review that Galton and Brodax not only had to review my script before making the completed budget attached to Marvel's infringing out-line, but the most telling evidence that Marvel in fact did copy directly

from my script in preparing its infringing work is found on Page 4 of the Marvel outline – admittedly prepared by Brodax and authorized by Galton – depicts the character “Assegai”, who is described as:

“a graceful, excitable strange-eyed, platinum-haired black man.”

That same discription – in almost identical language – appears on page 1 of my script, where Assagei is described as

“A strange-eyed, platinum-haired Black Officer, fighting with uncanny grace,”

For the Court’s convenience in making its own comparison, I attach page 4 of Marvel’s outline as Exhibit 2, and page 1 of my script as Exhibit 3.

17. As telling as the above quoted description is the fact that the name and the character “Assegai” only appear in my script and do not appear in the earlier synopsis on which Brodax claims to rely. There can therefore be no genuine dispute that Brodax, saw, copied and used as reference the script for “The Skyrider” which I caused to be registered with the United States Copyright Office to create Marvel’s Sy Ryder presentation.

18. Marvel’s last, most egregious distortion is the assertion by Galton and Brodax that neither man caused Marvel’s infringing outline to be displayed or distributed in the United States to those persons listed in paragraph 33 of the Amended Complaint, or others. (See Galton Affidavit, ¶24-25; Brodax Affidavit ¶28.)

19. Even prescinding from their internal contradictions, the protestations of Galton and Brodax are fully rebutted by Klein and Quiros, who have asserted in their

respective answers that Marvel, and not they, displayed and distributed Marvel’s infringing outline. (See Klein Answer, ¶60; Quiros Amended Answer, ¶97.)

20. There is, therefore, adequate basis for me to state, upon information and belief, that Marvel’s outline, which clearly infringed my copyright, not only was created by officers, agents and employees of Marvel, but was displayed and distributed to those persons identified in paragraph 33 of the Amended Complaint by Marvel, Galton and Brodax.

21. Defendants’ remaining assertions, on which they purport to rely for summary judgment, are likewise refuted by the following facts, of which I had personal knowledge at the time.

IV. THE FACTS WHICH DEFENDANTS CAN NOT DISPUTE REQUIRE SUMMARY JUDGMENT AGAINST THEM

22. The Amended Complaint states, and I now re-affirm, that I conceived and developed a motion picture project, tentatively entitled “The Skyrider” and, thereafter caused to be written a formal synopsis, outline and script for “The Skyrider”. (See, Amended Complaint ¶17.)

23. I have alleged, and also affirm, that I engaged Klein and Quiros in January, 1981, to assist in the financing of my production of “The Skyrider”, based upon Klein’s and Quiros’ representations that, through their respective connections, they could secure all monies required to complete my production of “The Skyrider”. By then, the project had been fully developed, at my expense, with illustrations, songs, a highly developed

marketing plan and a preliminary budget for the proposed project. (See, Amended Complaint ¶22.)

24. In the ensuing weeks, I have alleged and affirm, I presented "The Skyrider", to numerous individuals, introduced by Klein and Quiros, in a position to finance in whole, or in part, my intended production of "The Skyrider". (See Amended Complaint ¶23.)

25. In March and April, 1981, at a series of meetings in New York arranged by Klein and Quiros, I presented "The Skyrider" to Marvel by displaying and delivering copies of my work and disclosing all other commercial aspects of "The Skyrider". (See Amended Complaint ¶24.)

26. Galton and Brodax, on Marvel's behalf, proclaimed the project a capital success, both as a promising candidate for "box-office" receipts and profitable merchandizing using Marvel's worldwide publishing operations, its comic books, comic strips and costumed-character licensing.

27. What Marvel proposed for the production of "The Skyrider", as "producer", was beyond the role intended for it as a "production house" or jobber, and unacceptable to me. I therefore ceased all further negotiations with Marvel. (See Amended Complaint ¶26.)

28. Marvel continued to meet with Klein and Quiros, without my knowledge of consent. Nor did I know that Klein and Quiros did not intend to abide by their agreements with me regarding financing "The Skyrider" when, on or about June 8, 1981, I signed and initialed a series of shareholders agreements, memorializing our respective rights and obligations as shareholders

of LMN and its role in my contemplated production of the "The Skyrider". (See Amended Complaint ¶44.)

29. I believe the agreements referred to above granted, among other things, a limited option, upon stated conditions, for Klein and Quiros to participate in the production and profits of the contemplated movie "The Skyrider". However, the agreements I signed and initialed reserved to me: the right to make all artistic decisions concerning the movie "The Skyrider", the right to determine which animation houses to use and the right to determine who would direct the motion picture. (See Amended Complaint ¶45.)

30. Since all copies of the agreements I "signed and initialed" on or about June 8, 1981, were entrusted to Peter Shukat, once a defendant, I cannot now produce such agreements to the Court. I can state, nonetheless, that I never signed or authorized the signing of any "option" agreement in my individual capacity. I only signed such agreements as an officer of Netta Productions, Inc. Nor did I sign any such option in August, 1981.

31. When Klein and Quiros asked me to attend another meeting with Galton and Brodax on or about September 2, 1981, I complied with their request in the belief that their option, and LMN's regarding "The Skyrider" was about to expire. At the meeting at Marvel, with Galton and Brodax, among others, Marvel proposed again to produce "The Skyrider", on terms unacceptable to me. I rejected again any involvement by Marvel in any contemplated production of "The Skyrider".

32. As I have previously attested in this action, after my meeting with Marvel, Galton, Brodax, Klein, Quiros

and Dumler on September 2, 1981 – where I unequivocally rejected Marvel – I told both Scott and Peter Shukat that the option would expire on September 5, 1981, if no monies had been raised by then as required by the option, and I would not grant any further extensions.

I only accepted those monies paid by LMN, thereafter on Scott Shukat's express representations to me that those monies were received and held for me before September 5, 1981 – when the option expired.

33. When I affixed formal notice of my copyright to my script for "The Skyrider", and caused it to be delivered to Klein and Quiros and Dumler and Shukat, on or about November 2, 1981, I had no idea that a series of false and deceptive agreements had been created by defendants, purporting to grant to themselves and to others fictitious rights in respect of "The Skyrider". (See Amended Complaint ¶56.)

34. In February 1982, I still knew nothing of defendant's attempts to misappropriate "The Skyrider" when Marvel repeated its proposal to me, through Peter Shukat, that it produce "The Skyrider". Nor did I know that Marvel had already created, prepared, displayed and distributed a derivative work to the public, based in large part upon my script for "The Skyrider".

35. On or about February 8, 1982, I executed the Marvel agreements and placed in escrow with Peter Shukat all copies of the agreements. (See Amended Complaint ¶61.)

36. The terms of the escrow agreement accepted by Peter Shukat provided that my signature not be deemed effective unless and until my continuing objections to

Marvel's involvement were resolved to my satisfaction. (See Amended Complaint ¶62.)

37. My objections to Marvel were never satisfied; I, therefore, never released from escrow those agreements I signed in February, 1982.

V. Conclusion

38. What defendants now seek in their motions for summary judgment is to reap the ultimate benefits of the fraud they perpetrated upon me in 1981 and 1982. They refuse to divulge any agreements I actually signed and initialed, on or about June 8, 1981, and still continue to distort and misstate the facts concerning their infringements of my copyright.

39. Defendants ought not to be permitted to succeed.

/s/ Northern J. Calloway
Northern J. Calloway

Sworn to before me this
2nd day of April, 1984

/s/ Herbert Zischkau
Herbert Zischkau
Notary Public
State of New York
No. 4795560
Qualified in Westchester Co.
Commission expires March 30, 1985

(Exhibits and Affidavit of Service
omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

	X
NORTHERN J. CALLOWAY,	:
individually	:
and on behalf of LMN PRO-	:
DUCTIONS, INC.,	82 Civ. 8697 (RWS)
Plaintiffs,	:
-against-	:
THE MARVEL ENTERTAIN-	:
MENT GROUP, a division of	:
CADENCE INDUSTRIES COR-	:
PORATION, JAMES GALTON,	:
AL BRODAX, MICHAEL S.	:
KLEIN, LUIS QUIROS,	:
DUMLER & GIROUX, THE	:
SHUKAT COMPANY, LTD.,	:
SCOTT SHUKAT, PETER S.	:
SHUKAT, ESQ. and, where nec-	:
essary, LMN PRODUCTIONS,	:
INC.,	:
Defendants.	X

*PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS OR FOR SUM-
MARY JUDGMENT, AND IN SUPPORT OF HIS CROSS-
MOTION FOR SUMMARY JUDGMENT*

This memorandum is submitted on behalf of plain-
tiff, Northern J. Calloway ("Calloway")

- (i) in further support of his amended complaint;
- (ii) in opposition to the motion by defendants The Marvel Entertainment Group, a division of Cadence Industries Corporation ("Marvel"), James Galton ("Galton") and Al Brodax ("Brodax") for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure;

(iii) in opposition to the motion by defendant, Michael S. Klein ("Klein") for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure;

(iv) in opposition to the motion by Luis Quiros ("Quiros") which seeks to dismiss all, or a part of, the amended complaint; and,

(v) in support of plaintiff's cross-motion for partial summary judgment against Marvel, Galton, Brodax and Klein, on the issue of liability only, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

This action by plaintiff - originally commenced 15 months ago - charges defendants with separate infringements of plaintiff's copyright in respect of the script which he wrote, and caused to be registered, in contemplation of his production of an animated feature-length, science fiction musical, tentatively entitled "The Sky rider".

Both the original complaint, which this Court dismissed with leave to replead, and the amended complaint served thereafter allege that Marvel, Galton, Brodax, Klein and Quiros prepared and displayed a work entitled "Sy Ryder", derived in large part from plaintiff's copyrighted script for "The Sky rider".

Both the original complaint and the amended complaint also allege that these five defendants unlawfully induced, and conspired with, others to cause to be drafted and forged a series of documents purporting to authorize defendants' infringements of plaintiff copyright. The complaint and amended complaint charged all

defendants with misappropriation and unfair competition in respect of plaintiff's motion picture project by use of such contrived "agreements".

The answers served by these defendants remaining, after this Court's decision which branded them primary infringers, revealed nothing except their continuing desire to conceal from plaintiff and the Court the facts underlying this action. The first glimmer of candor appeared when Marvel and Galton and, separately, Brodax filed third-party complaints against those defendants who were dismissed from this action, notwithstanding the claim that they purported to authorize the preparation and display of Marvel's infringing outline.

Klein and Quiros have also claimed over against Marvel and Galton and Brodax, asserting that Marvel and Galton and Brodax prepared the infringing work, rather than them.

The answers and the third-party complaints filed by defendants made it abundantly clear that the question for trial was not what violations so clearly infringed plaintiff's rights, but who would be ultimately responsible for plaintiff's recovery.

THE FACTS NOW ADMITTED BY DEFENDANTS CONFIRM THEIR LIABILITY TO PLAINTIFF

Defendants' motions for summary judgment desperately seek to avoid liability. Their brazen assertions, before discovery is had, can only be viewed as the product of concern for what will be revealed as this action proceeds.

The affidavits filed by defendants in support of their motions for summary judgment cannot achieve that objective. Defendants not only fail to assert any facts not in dispute which would permit summary judgment, but clearly admit the essential facts which confirm their liability. For purposes of plaintiff's cross-motion for summary judgment against Marvel, Galton and Brodax the determinative facts are stated by them:

- Galton states, in his Affidavit, sworn to February 1, 1984,

19. In November or December 1981, LMN through Klein or Quiros or both of them requested that Brodax prepare material for The Sky rider which might make it more interesting to investors. I was thereafter in contact with Brodax and asked him if he could work up such material. Brodax subsequently prepared and delivered to Marvel the material which he describes in his affidavit at paragraph 19 thereof.

20. . . . I agreed that Marvel would put together the material for the presentation.

- Brodax states, in his Affidavit, sworn to February 2, 1984,

17. In November or December of 1981, LMN through either Klein or Quiros requested that I prepare material with respect to The Sky rider which might make it more interesting or saleable to prospective investors. Mr. Galton asked me if I could prepare such material, which I agreed to do. At or about the same time, I received a copy of The Sky rider "Synopsis" which appears as the first of the three instruments annexed to the amended complaint as Exhibit A, so that I would have something to work with in preparing the requested material.

* * *

19. Within approximately two weeks after I received the "Synopsis" and the request to prepare material, I prepared and submitted to Marvel the following material contained in Exhibit C to the amended complaint: the third, fourth, sixth, seventh and eighth pages and the material at the last two lines of the nineteenth page following the word "beyond".

Galton and Brodax, on Marvel's behalf, admittedly authorized and prepared that infringing outline which is the subject of this action; they all are liable for that infringement.

Section 106 of the Copyright Act of 1976, 17 U.S.C.A. § 106, provides that "the owner of copyright under this title has the exclusive rights to do and to authorize . . . [the preparation of] derivative works based on the copyrighted work [and] in the case of literary, musical, dramatic, and choreographic works, pantomines, and pictorial, graphic, or sculptural works . . . to display the copyrighted work publicly."

Section 501 of the Act then states:

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 . . . is an infringer of the copyright.

Since plaintiff has attested that he did not "do" or "authorize" the preparation of Marvel's infringing outline, Marvel, Galton and Brodax are liable for their admitted violations of the Act.

To the same effect, Klein states in his Affidavit, sworn to February 29, 1984,

16. . . . We [Klein and others on LMN's behalf] engaged Marvel Comics to create a display to be

shown to potential investors along with the screenplay script in order to raise the required funds. * * * (I understand that the display created by Marvel to be used as a selling device to attract investors is alleged to be the infringing work upon which the plaintiff's copyright claim is based.)

Klein too is liable to plaintiff for his direct participation in the creation of that work, and his conduct in purporting to authorize Marvel's preparation of an infringing work, as well as his direct participation in the creation of that work.

Defendants' asserted reliance upon documents forged by them, or others, does not provide any means of escape from their liability imposed by the Copyright Act, as their respective third-party complaints against Peter and Scott Shukat, the Shukat Company, Ltd. and Egon Dumler, and their cross-claims against each other, make fairly apparent.

THE FACTS DISPUTED BY PLAINTIFF PRECLUDE SUMMARY JUDGMENT AGAINST HIM

The only basis on which defendants could hope to obtain summary judgment in their favor is their claim that plaintiff signed or approved the agreements in which they purport to rely.

Plaintiff's Affidavit, sworn to April 2, 1984, unequivocally attests that he neither signed nor approved the agreements on which defendants purport to rely. His Affidavit states:

6. On July 29, 1983, I caused my Amended Complaint in this action to be served in accordance with this Court's order dismissing the original complaint.

The Amended Complaint alleged the same operative facts as the original complaint-viz., Marvel's preparation of a derivative work based in large part on my script for "The Skyrider", and Marvel's display through-out the entertainment industry of that infringing work in cooperation with Klein and Quiros, among others. However, I did not refer to, or annex, those documents which, I learned in the interim, had been contrived and forged by defendants. Instead, the Amended Complaint charged:

'52. On or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, backdated to June 8, 1981, purporting to confirm by formal agreement the terms and conditions of a putative option for LMN to acquire "The Skyrider."

The documents referred to above, which I believe Peter Shukat contrived (and others perhaps forged) while he was my attorney and trusted advisor, are: the option agreement, the writers agreement and the composition agreement, all dated June 8, 1981, annexed to the original complaint as the second, third and fourth documents, respectively, comprising Exhibit C.

7. Based upon my review of the originals of these three documents, produced in other proceedings, I hereby re-affirm that I neither signed nor approved those agreements. Defendants should not, I submit, be entitled to claim reliance upon documents which I now know were forged and contrived to deceive.

There could be no clearer statement that defendants have nothing authentic of which to rely.

Defendants motions for summary judgment, before discovery, must be denied.

QUIROS' TAG-ALONG MOTION PROPERLY ASKS THIS COURT TO RECONSIDER ITS PRIOR DECISION

Quiros has also moved pursuant to Rules 9 and 12 of the Federal Rules of Civil Procedure for an order dismissing, or striking, parts of the amended complaint, in reliance upon this Court's earlier order, dated December 22, 1983. In that decision the Court dismissed the amended complaint as to those defendants against which Marvel, Galton and Brodax have now filed third-party complaints.

The additional evidence provided both by the moving defendants' Affidavits and third-party complaints suggest that the Court may have been misled in concluding that Peter Shukat, Scott Shukat, the Shukat Company, Ltd. and Egon Dumler should not be held liable for purporting to authorize the other defendants infringements of plaintiff's copyright.

Plaintiff respectfully suggests that Quiros' motion for relief, based solely upon the Court's prior rulings, be denied in its entirety, unless-and-until defendants produce all copies of all agreements relating to plaintiff's contemplated production of "The Skyrider".

CONCLUSION

On the basis of the foregoing, and all other submissions in connection with the motions discussed above, plaintiff submits that defendants motions should be denied and judgment entered, on liability only, against Marvel, Galton, Brodax, and Klein.

Dated: New York, New York
April 2, 1984

Respectfully submitted

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(Affidavit and Affirmation of Service
omitted in printing)

UNITED STATES DISTRICT
COURT SOUTHERN DIS-
TRICT OF NEW YORK

_____ X
NORTHERN J. CALLOWAY, :
individually and on behalf of :
LMN PRODUCTIONS, INC., :
Plaintiffs, : 82 Civ. 8697 (RWS)

-against-

THE MARVEL ENTERTAIN- :
MENT GROUP, a division of :
CADENCE INDUSTRIES :
CORPORATION, JAMES :
GALTON, AL BRODAX, :
MICHAEL S. KLEIN, LUIS :
QUIROS, DUMLER & GIR- :
OUX, THE SHUKAT COM- :
PANY, LTD., SCOTT :
SHUKAT, PETER S. SHUKAT, :
ESQ. and, where necessary, :
LMN PRODUCTIONS, INC., :

Defendants. :

_____ X

PLAINTIFF'S REPLY MEMORANDUM
IN FURTHER SUPPORT OF HIS
CROSS-MOTION FOR SUMMARY JUDGMENT

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UNITED STATES DISTRICT
COURT SOUTHERN DIS-
TRICT OF NEW YORK

NORTHERN J. CALLOWAY,
individually and on behalf of
LMN PRODUCTIONS, INC.,

-against-

THE MARVEL ENTERTAIN-
MENT GROUP, a division of
CADENCE INDUSTRIES
CORPORATION, JAMES
GALTON, AL BRODAX,
MICHAEL S. KLEIN, LUIS
QUIROS, DUMLER & GIR-
OUX, THE SHUKAT COM-
PANY, LTD., SCOTT
SHUKAT, PETER S. SHUKAT,
ESQ. and where necessary,
LMN PRODUCTIONS, INC.,

Defendants.

X

: 82 Civ. 8697 (RWS)

X

PLAINTIFF'S REPLY MEMORANDUM
IN FURTHER SUPPORT OF HIS
CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants' separate responses to plaintiff's cross-motion for summary judgment on liability only further confirm their admitted infringements of plaintiff's copyright in respect of "The Sky rider".

For purposes of clarity in this Reply, and to ensure that defendants do not again succeed in their attempts to mislead the Court, the determinative facts on which plaintiff's cross-motion is based are briefly restated below. They are:

- that plaintiff conceived and developed that motion picture project, tentatively entitled "The Sky rider", which is described in plaintiff's Amended Complaint;
- that plaintiff caused to be written the formal synopsis, outline and script which are annexed in the Amended Complaint as Exhibit A;
- that, on or about November 2, 1981, before displaying or delivering copies to anyone, plaintiff affixed to his script formal notice of copyright;
- that Marvel, Galton and Brodax thereafter created a work based in large part upon plaintiff's copyrighted script;
- that Marvel, Galton and Brodax displayed and delivered to Klein and Quiros copies of their infringing work; and,
- that Klein and Quiros (together with Brodax) caused their infringing work to be displayed and distributed throughout the entertainment industry in the United States and abroad.*

These facts, set forth above, establish without more that defendants are liable for their respective infringements of plaintiff's copyright, both as a result of the creation and display of Marvel's outline by Galton and Brodax, and as a result of Klein's separate, admitted display of Marvel's outline throughout the entertainment industry.

* As a condition precedent to this action, plaintiff also caused his script for "The Sky rider" to be registered with the United States Register of Copyright effective July 26, 1982, and has since received from the register of copyright a certificate of registration, dated and identified as follows: "July 26, 1972, No. PAU 423-282".

Because defendants have not recanted their admissions, or sought to change or modify their prior affidavits, this Reply is limited to defendants' newly created array of theories which seek to obfuscate those determinative facts they admit are true.

MARVEL'S RESPONSE TO PLAINTIFF'S CROSS-MOTION IS BASELESS

The suggestion before by Marvel, Galton and Brodax that they could only be liable for acts done by them *after* the effective date of plaintiff's copyright registration – viz, July 26, 1982 – was shown to be baseless in plaintiff's earlier opposition to defendants' previous motions to dismiss the Amended Complaint. Then plaintiff stated, at p. 2 of his Memorandum,

"Since no one argued this question before, we assume the Court's statement was based upon the confusion engendered in the record by defendants. The amended complaint, therefore, makes clear that plaintiff created "The Skyrider" in 1979; affixed formal notice of his copyright to the script on November 2, 1981; and delivered the script to defendants thereafter.

... [T]he effective date of plaintiff's copyright registration has no bearing whatsoever on defendants' violations of the Copyright Act of 1976, as §§ 101 and 102 of the Act clearly provide that copyright protection subsists from the date of "fixation" of any work in tangible form; where the work has been prepared over a period of time in different versions, each version is protected as a separate work, at the time it became fixed in tangible form." [Note 2].

Defendants did not cite anything then, and cite nothing now, which might conceivably be read to support

their position. Indeed, they do not even attempt to explain how their ridiculous argument could be consisted with those amendments to the Copyright Act, adopted in 1976, the principal purpose of which was to eliminate any distinction between "federal" and "common law" copyright protection by making clear that copyright protection subsists from the date of "fixation".

Under the Copyright Act of 1976, such protection is automatic. The only purpose of any notice of copyright is to foreclose a defense of "innocent" infringement; the only purpose of registration itself is to comply with the statute's condition that, "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title."

An argument to the contrary would be disingenuous.

Defendants have also sought twice to mislead this Court (i) by feigning ignorance of facts or plaintiff's rights, the lie of which was then shown by plaintiff's submissions, and (ii) by arguing evidentiary theories facially contradicted by the evidence on which they purport to rely. It need only be said in this Reply that defendants now concede they had in their possession plaintiff's copyrighted script – which once was denied – and cannot contest that the Shareholder's Agreement was sent by Quiros to Brodax.

For purposes of this Reply, however, the more important fact is that no matter how much they may wish it not so, plaintiff has unequivocally affirmed that the documents on which defendants purport to rely were forged

without plaintiff's knowledge or consent. Stated otherwise, defendants can find no support for their motions for summary judgment in rumblings about documents signed by others, a forced construction of language which plaintiff never approved, or any obvious disappointment by them at plaintiff's discovery of the originals of the documents which confirm they were forged by defendants' cohorts.

KLEIN'S RESPONSE TO PLAINTIFF'S CROSS-MOTION IS EQUALLY BASELESS

The essence of Klein's opposition to plaintiff's cross-motion is Klein's attorneys' attempt to make plaintiff's affidavit say what it clearly does not.

By pejorative phrasing and selective quotation – indeed, no proper quotation at all – Klein successfully ignores plaintiff's reaffirmation of the fact that he "neither signed nor approved those agreements". [See plaintiff's affidavit of April 2, 1984, ¶ 7.] The "agreements" on which Klein relies cannot be authenticated on these motions, nor can Klein's purported reliance defeat plaintiff's cross-motion, as they are merely red-herrings designed to distract attention from the determinative facts on which plaintiff's cross-motion is based.

Once it is shown, as it already has been, that plaintiff did not sign or approve any such document, defendants' only recourse is to claim-over against those individuals who either forged plaintiff's signature or represented they were authorized to sign for him. Defendants' third-party complaints against Scott Shukat and Dumler & Giroux, on whom they claim they relied perfectly mirror

plaintiff's claims of infringement in a context which even more clearly demonstrates liability for wrongful "authorization" under the Copyright Act of 1976.

Whether or not these defendants can prevail on their claim or reliance against the Shukats and Dumler, however, has nothing whatsoever to do with these defendants' admitted infringements of plaintiff's copyright for the script for "The Sky rider".

CONCLUSION

For the foregoing reasons, defendants' respective motions for summary judgment should be denied and plaintiff's cross-motion be granted.

Dated: New York, New York
May 3, 1984

Respectfully submitted,

/s/ Ray L. LeFlore
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(Certificate of Service omitted in printing)

UNITED STATES DISTRICT
COURT SOUTHERN DIS-
TRICT OF NEW YORK

NORTHERN J. CALLOWAY,
individually and on behalf of
LMN PRODUCTIONS, INC.,

Plaintiffs,

-against-

THE MARVEL ENTERTAIN-
MENT GROUP, a division of
CADENCE INDUSTRIES COR-
PORATION, JAMES GALTON,
AL BRODAX, MICHAEL S.
KLEIN, LUIS QUIROS,
DUMLER & GIROUX, THE
SHUKAT COMPANY, LTD.,
SCOTT SHUKAT, PETER S.
SHUKAT, ESQ., and where
necessary, LMN PRODUC-
TIONS, INC.,

Defendants.

82 Civ. 8697 (RWS)

OPINION

(Filed July 5, 1984)

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SWEET, D. J.

Defendants Marvel Entertainment Group ("Marvel"), James Galton ("Galton"), Al Brodax ("Brodax"), Michael S. Klein ("Klein") and LMN Production, Inc. ("LMN") have moved pursuant to Rule 56, Fed.R.Civ.P., to dismiss the amended complaint of plaintiff Northern J. Calloway ("Calloway"). Calloway has moved for partial summary judgment with respect to liability against Klein, Marvel, Brodax and Galton. Marvel, Galton and Brodax have moved for summary judgment dismissing the cross-claim of defendant Luis Quiros ("Quiros"). Quiros, Klein and LMN have moved to strike Brodax's third-party complaint against them. Quiros has moved pursuant to Rules 9(b) and 12(b)(6) to dismiss the amended complaint and pursuant to Rule 12(f) to strike certain parts of the complaint. For the reasons given below, the motions to strike the third-party complaint and Quiros' motion to dismiss are granted and all other motions are denied.

The facts of this matter were set forth in the court's previous opinions and will not be repeated here.

Summary Judgment Motions Against the Complaint

In support of their summary judgment motion against the amended complaint, defendants contend (1) they had no contact with the infringing work after January 1982, and (2) the option agreement authorized their actions.

As to defendants' first contention, although registration is a prerequisite to institution of an infringement

action, 17 U.S.C. § 411, the protection of the copyright laws is not limited to infringing acts following registration. This contention fails.

Defendants' second contention is that the option agreement ("Option Agreement"), which is dated June 8, 1981 but which defendants contend was executed in August 1981, authorized the acts of the moving defendants. Calloway does not dispute defendants' contention that the terms of the Option Agreement would authorize defendants' acts, but states by affidavit that he never signed or approved the Option Agreement and that Peter Shukat, without Calloway's knowledge, affixed a facsimile of Calloway's signature to the agreement. Later in his affidavit, however, Calloway states that he "never signed or authorized the signing of any 'option' agreement in my individual capacity. I only signed such agreements as an officer of Netta Productions, Inc. Nor did I sign any such option in August, 1981." Calloway has not explained the inconsistency between these two statements. His having signed the Option Agreement "as an officer of Netta Productions, Inc." appears to be without significance in this context. Calloway annexed the Option Agreement as an exhibit to the original complaint and did not challenge the authenticity of the Option Agreement during earlier motions in this case. He appears to contend that he signed an option agreement on June 8, 1981, in which he reserved the right to make all artistic decisions concerning "The Sky rider," but that the agreement he signed was altered without his consent, and that he did not discover these alterations until after he filed the complaint.

Calloway has by a narrow margin put sufficient facts in contention to withstand defendants' summary judgment motion. However, Calloway should be aware that

this court has awarded attorney's fees against a plaintiff who was found after trial to have pursued a claim in bad faith and without factual support. *See Schwartz v. Malm*, No. 80-6449, slip op. at 5-8 (S.D.N.Y. Sept. 28, 1983). In the copyright area, such an award is specifically authorized by statute, *see* 17 U.S.C. § 505, and this court has awarded costs to prevailing defendants in copyright actions even where the suit was not held to have been brought in bad faith. *See, e.g., Burnett v. Lambino*, 206 F. Supp. 517 (S.D.N.Y. 1962) (Feinberg, J.). The court will not hesitate to award such costs if the facts are found after trial to warrant such an award.

Calloway's summary judgment motion is denied because of the dispute in facts referred to above.

Summary Judgment Against Cross-Claim

Marvel Galton and Brodax have moved to dismiss the cross-claims of LMN, Klein and Quiros. The cross-claim asserts that if LMN, Klein and Quiros are liable to Calloway, then Marvel, Galton and Brodax are liable to them as contributory infringers. Viewing the facts in the light most favorable to LMN, Klein and Quiros, it cannot be said that the cross-claim is deficient as a matter of law, and, accordingly, the motion to dismiss the cross-claim is denied.

Motion Against Third-Party Claim

LMN, Klein and Quiros have moved to dismiss the Brodax's third-party claim against them.

Because LMN, Klein and Quiros are co-defendants of Brodax, a Rule 13 cross-claim is the proper method for assertion of Brodax's claim against them, rather than a Rule 14 third-party complaint. Accordingly, Brodax's third-party complaint against Klein, LMN and Quiros is dismissed.

Quiros' Motion to Dismiss and to Strike

Quiros has moved for relief accorded the defendants in positions similar to his in the December 22, 1983 opinion.

For reasons stated in that opinion, Quiros is granted the same relief accorded to Klein and LMN in the December 22, 1983 Opinion, and the amended complaint's references to works other than the script, the claim for punitive damages and the cause of action for conspiracy are stricken as to Quiros.

Discovery will be completed by September 24, 1984 and pretrial orders submitted by October 1 1984.

IT IS SO ORDERED.

DATED: New York, N.Y.
July 3, 1984

/s/ R. Sweet
ROBERT W. SWEET
U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NORTHERN J. CALLOWAY,
individually and on behalf of
LMN PRODUCTIONS, INC.,

Plaintiffs,

-against-

THE MARVEL ENTERTAINMENT
GROUP, a division of CADENCE
INDUSTRIES CORPORATION,
JAMES GALTON, AL BRODAX,
MICHAEL S. KLEIN, LUIS QUIROS,
and, where necessary, LMN PRO-
DUCTIONS, INC.,

Defendants.

THE MARVEL ENTERTAINMENT
GROUP, a division of CADENCE
INDUSTRIES CORPORATION,
JAMES GALTON, AL BRODAX,
LMN PRODUCTIONS, INC., MIC-
HAEL KLEIN and LUIS QUIROS,

Third-Party Plaintiffs,

-against-

DUMLER & GIROUX, THE SHUKAT
COMPANY, LTD., SCOTT SHUKAT
and PETER SHUKAT, ESQ.,

Third-Party Defendants.

X

: CIVIL ACTION
:
: NO. 82-8697 (RWS)

X

X

ANSWERS AND OBJECTIONS OF PLAINTIFF
NORTHERN J. CALLOWAY TO DEFENDANT
PETER SHUKAT'S INTERROGATORIES

For his objections, generally, to the Interrogatories propounded by defendant Peter Shukat, plaintiff Northern J. Calloway ("Calloway") states as follows:

Calloway declines to answer, and hereby objects to, each and every interrogatory, and part thereof, which (i) seeks information concerning confidential communications between, or among, Calloway and his attorneys retained to render legal advice and professional services; (ii) seeks information concerning materials prepared in anticipation of this, or any related, litigation; or (iii) seeks information concerning the mental impressions, conclusions, opinions or legal theories of Calloway or his attorneys or other representatives concerning this, or any related, litigation.

In addition to the foregoing general objections, Calloway specifically objects to each of Peter Shukat's Interrogatories set forth below, and subject thereto, answers as follows:

Interrogatory 1

Identify with particularity each and every document plaintiff claims is forged.

Interrogatory 2

Identify with particularity each and every document plaintiff claims was forged by third-party defendant, Peter Shukat.

Interrogatory 3

In respect to any documents claimed to be forged, indicate the page and line where such forgery occurred, the signature forged, and the person or persons plaintiff claims was responsible.

Interrogatory 4

Identify any and all documents plaintiff claims was (sic) fraudulently altered.

Interrogatory 5

Identify each and every document plaintiff claims was fraudulently altered by third-party defendant, Peter Shukat.

Interrogatory 6

Identify in respect to any of the documents referred to in Response to Interrogatories 4 and 5, (a) the line and page where such fraudulent alterations occurred, (b) the specific language fraudulently altered, (c) the original language plaintiff claims was on the document as it was authentically prepared, and (d) the person or persons plaintiff claims was responsible.

Interrogatory 7

In respect to plaintiff's claims that documents were forged and/or fraudulently altered, identify and describe any and all authentic documents that plaintiff relied upon

to evidence the forgeries and/or fraudulent alterations cited in response to these interrogatories.

Answers and Objections to Interrogatories 1 through 7

Plaintiff has never alleged any forgery of plaintiff's signature, nor is it alleged that any defendant, or defendants, fraudulently altered any document bearing any reasonable relationship to any document plaintiff ever executed on his own behalf or on behalf of Netta Productions, Inc. ("Netta").

Paragraphs 51 through 53 and paragraph 55 of the Amended Complaint state as follows:

51. In furtherance of their scheme, as aforesaid, at Marvel's behest, Klein, Quiros and Dumler, upon information and belief, on or about August 5, 1981, solicited Peter Shukat to assist in their misappropriation of plaintiff's rights in respect of "THE SKYRIDER". Peter Shukat was then plaintiff's attorney, retained to advise plaintiff regarding "THE SKYRIDER".

52. On or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, back-dated to June 8, 1981, purporting to confirm by formal agreement the terms and conditions of a putative option for LMN to acquire "THE SKYRIDER".

53. Peter Shukat had no authority whatsoever to purport to affix plaintiff's signature to said documents, and did so in blatant contradiction of his fiduciary duties and obligations to plaintiff.

55. Plaintiff did not know or approve of the agreements referred to above, and never authorized

anyone to purport to sign such agreements on his behalf.

Subject to the foregoing objections, pursuant to Rule 33(c) of the Federal Rules of Civil Procedure (hereinafter "Rule 33(c)"), plaintiff incorporates by reference the transcript of testimony given by plaintiff in this action, including, without limitation, testimony given on April 12, 1985.

Until plaintiff is provided discovery of the facts in this action, by oral testimony and further verification of the absence of any basis for authentication by defendant of relevant documents, plaintiff cannot now answer further in this regard, except specifically states that Peter Shukat was then the only person with access to, or ability to provide the other defendants, such facsimiles from the documents actually signed by plaintiff on or about June 8, 1981, and refers to those documents presently held under seal by the United States District Court, Southern District of New York, which evidence the affixation of a facsimile of plaintiff's signature thereto, and evidence defendants' fraudulent intent in respect thereto.

Interrogatory 8

Identify the names and addresses of all forensic handwriting and document examiners and/or experts that plaintiff will rely upon at time of evidentiary hearing or trial as expert witnesses, who will testify that the documents prepared and exchanged in connection with the transactions in suit in this case were forged and/or fraudulently altered.

Interrogatory 9

Describe with particularity the nature and the background of all such experts who will so testify at the time of hearing and/or trial including, but not limited to the following:

- (a) Schools;
- (b) Degrees;
- (c) Publications;
- (d) Prior associational or employment background with government, police, court and investigatory agencies (public or private);
- (e) All texts, materials, manuals, literature, whether published or not which such experts rely upon in giving their opinions and/or testimony that the documents in issue in this case have been forged and/or fraudulently altered.

Interrogatory 10

Set forth the reasons and the substance of all expert opinions as to why plaintiff's experts opine that the documents cited in response to plaintiff's answers to these interrogatories have been forged and/or fraudulently altered.

Objection to Interrogatories 8 through 10

Plaintiff objects to these Interrogatories as premature. Plaintiff agrees to provide an appropriate response to these interrogatories if and when expert witnesses, if any, are retained by him for purposes of trial.

Should defendants require, or request, plaintiff's verification in respect of any answer provided herein, under oath, such will be provided, upon demand therefor.

Dated: New York, New York
April 22, 1985

PAVELIC & LeFLORE

By: /s/ Ray L. LeFlore
(A Member of the
Firm)
Attorneys for Plaintiff
Northern J. Calloway
919 Third Avenue
New York, New York
10022
(212) 319-7760

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

<hr/>		X
NORTHERN J. CALLOWAY,	:	
individually and on behalf of	:	CIVIL ACTION
LMN PRODUCTIONS, INC.,	:	NO. 82-8697 (RWS)
Plaintiffs,	:	
-against-	:	
THE MARVEL ENTERTAINMENT	:	
GROUP, a division of CADENCE	:	
INDUSTRIES CORPORATION,	:	
JAMES GALTON, AL BRODAX,	:	
MICHAEL S. KLEIN, LUIS QUIROS,	:	
and, where necessary, LMN PRO-	:	
DUCTIONS, INC.,	:	
Defendants.	:	
<hr/>		X
THE MARVEL ENTERTAINMENT	:	
GROUP, a division of CADENCE	:	
INDUSTRIES CORPORATION,	:	
JAMES GALTON, AL BRODAX,	:	
LMN PRODUCTIONS, INC., MIC-	:	
HAEL KLEIN and LUIS QUIROS,	:	
Third-Party Plaintiffs,	:	
-against-	:	
DUMLER & GIROUX, THE SHUKAT	:	
COMPANY, LTD., SCOTT SHUKAT	:	
and PETER SHUKAT, ESQ.,	:	
Third-Party Defendants.	:	
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**PLAINTIFF'S ANSWERS TO DEFENDANT
LUIS QUIROS' INTERROGATORIES**

For his answers to the Interrogatories propounded by defendant, Luis Quiros ("Quiros"), plaintiff, Northern J. Calloway ("Calloway"), states as follows:

FIRST: Plaintiff has heretofore made, and hereby expressly preserves, objections to each and every interrogatory, and part thereof, propounded by Marvel and Galton which (i) seeks information protected by the attorney-client privilege and, thus, is not subject to discovery; (ii) seeks information concerning materials prepared in anticipation of litigation or for trial; (iii) seeks information concerning the mental impressions, conclusions, opinions or legal theories of plaintiff's attorneys and other representatives; or (iv) seeks information concerning any expert who is not expected to be called as a witness at trial.

SECOND: Plaintiff has not yet been permitted any depositions of defendants or third-party defendants in this action; until such discovery is permitted, plaintiff cannot know the full scope and extent of his case-in-chief, or identify all witnesses he will be required to call at trial.

THIRD: Notwithstanding the foregoing, the Court has ruled that plaintiff must now answer in full the supplemental interrogatories propounded by Shukat, presumably based only upon such information as plaintiff has thus far acquired, as no more could be ordered of plaintiff. Pursuant thereto, subject to such amendments as may be required as a result of further discovery herein, Plaintiff's answers are set forth below.

Interrogatory 1

Identify each non-expert witness whom you may call to testify on your behalf at trial in this action and give a brief description of each witness' testimony.

Answer to Interrogatory 1

I. Northern J. Calloway
424 West End Avenue
New York, New York 10024

Plaintiff may be called to testify at trial concerning the history, background and accomplishments, the creation, fixation and object of "The Sky rider", his copyright, registration of the script for "The Sky rider", defendants' access to, and use of, plaintiff's copyrighted work and, to the extent such matters are personally known to him:

(a) The formation and Purpose of Netta Productions, Inc., its intended role in the contemplated production of "The Sky rider", the documents signed by plaintiff on its behalf, on or about June 8, 1981, prepared by (or at the direction of Peter S. Shukat, as his attorney, consisting of (i) an Option Agreement, dated June 8, 1981, by and between LMN Productions, Inc., Gavin Spencer and Netta Productions, Inc.; (ii) a Composition Agreement, dated June 8, 1981, by and between LMN Productions, Inc., Gavin Spencer and Netta Productions, Inc.; and (iii) a Writers Agreement, dated June 8, 1981, by and between LMN Productions, Inc. and Netta Productions, Inc.

(b) The formation and purpose of LMN Production, Inc. facts of which he may have knowledge regarding the

defendant's distribution or use of defendant's infringing work.

III. James Galton
Al Brodax

The Marvel Entertainment Group, a division of Cadence Industries, Inc.

Plaintiff may call James Galton and/or Al Brodax to testify at trial concerning Marvel's intended purposes and uses of The Skyrider; Marvel's unlawful creation and distribution of a work which infringed plaintiffs' copyright; Marvel's scheme, artifice and devices intended to misappropriate "The Skyrider"; Marvel's acts in furtherance thereof; the acts of each individual in that regard, and Marvel's appraisals of the value of "The Skyrider".

IV. Michael S. Klein
New York, New York

Plaintiff may call Michael S. Klein ("Klein") to testify concerning the intended role and purpose of LMN Productions, Inc., the waste and misappropriation of its corporate assets, his unlawful participation in Marvel scheme, artifice and devices referred to above, his own participation in the creation and distribution of a work which infringed plaintiff's copyright in respect of "The Skyrider" and Klein's knowledge of the acts and misconduct of the other defendants.

V. Luis Quiros
Larchmont, New York

Plaintiff may call Michael S. Klein ("Klein") to testify concerning the intended role and purpose of LMN Productions, Inc., the waste and misappropriation of its corporate assets, his unlawful participation in Marvel's

scheme, artifice and devices referred to above, his own participation in the creation and distribution of work which infringed plaintiff's copyright in respect of "The Skyrider" and Klein's knowledge of the acts and misconduct of the other defendants.

VI. Based upon the facts now known to plaintiff, plaintiff may also call Egon Dumler, Dumler and Giroux; Peter S. Shukat, Esq.; Scott Shukat, the Shukat Company, Ltd.; and/or Gerald Morganstern, Esq.: all to testify concerning their knowledge of, and participation in, the events described above and set forth in the Amended Complaint.

Interrogatory 2

Identify each expert witness whom you expect to call to testify on your behalf at trial in this action, and for each expert witness:

- (a) State the subject matter on which he/she is expected to testify;
- (b) State the substance of the facts and opinions to which he/she is expected to testify; and
- (c) Provide a summary of the grounds for each opinion.

Answer to Interrogatory 2

Upon information and belief, plaintiff's attorneys have retained Pearl Tytell, of Tytell Questioned Document Laboratory, 116 Fulton Street, New York, New York, to consult with plaintiff's attorneys concerning certain documents and things which may be at issue in this action; Ms. Tytell has, upon information and belief, preliminarily

inspected and analyzed certain documents and things produced by D'Amato & Lynch, attorneys for former defendants, Dumler & Giroux.

Neither plaintiff, nor his attorneys (upon information and belief), has any written or final statement of findings from Ms. Tytell, and none has yet been requested. Because there have been no depositions of defendants or third-party defendants, it is impossible to know whether or not any forensic expert will be required at trial and, even if required, the foundation, the nature or the scope of any such testimony.

For present purposes, plaintiff must assume that defendants and third-party defendants will be required to testify truthfully, consistent with the documentary evidence already obtained in discovery, as well as plaintiff's own testimony herein, in which event no expert testimony should be required at trial.

- (a) not available, see above.
- (b) not available, see above.
- (c) not available, see above.

Interrogatory 3

Identify each document, relating to or referred to in the allegations of the Amended Complaint, that you allege is forged in whole or in part. For each such document:

- (a) state the nature of the forgery;
- (b) state whom you believe caused the forgery;

- (c) state when you believe the forgery occurred;
- (d) state the significance of such forgery;
- (e) state any evidence you have of such forgery;
- (f) identify any witness you expect to testify on your behalf at trial to substantiate the allegation of forgery.

Answer to Interrogatory 3

Not applicable.

Interrogatory 4

Identify each document, relating to or referred to in the allegations of the Amended Complaint, that you allege has been physically modified or altered, in whole or in part. For each such document:

- (a) state the nature of the modification or alteration;
- (b) state whom you believe caused the modification or alteration;
- (c) state when you believe the modification or alteration occurred;
- (d) state the significance of the modification or alteration;
- (e) state any evidence you have of such modification or alteration;
- (f) identify any witness you expect to testify on your behalf at trial to substantiate the allegation of modification or alteration.

Answer to Interrogatory 4

All documents bearing the dates June 8, 1980, purporting to reflect any agreement between Northern J.

Calloway and LMN Productions, Inc., which documents were not notarized and actually purportedly signed on August 5, 1980, generally referred to in this case as (i) an Option Agreement, dated June 8, 1984, purportedly by and between LMN Productions, Inc., Gavin Spencer and plaintiff; (ii) a Composition Agreement, dated June 8, 1981, purportedly by and between LMN Productions, Inc., Gavin Spencer and plaintiff; and (iii) a Writers agreement, dated June 8, 1981, purportedly by and between LMN Productions, Inc. and plaintiff.

(a) See plaintiff's answers to Interrogatories 1 and 2 to the Supplemental Interrogatories propounded by Peter S. Shukat.

(b) Until plaintiff is provided discovery of the facts in this action, by oral testimony and further verification of the absence of any basis for authentication by defendant of relevant documents, plaintiff cannot now answer further in this regard, except specifically states that Peter Shukat was then the only person with access to, or ability to provide the other defendants, such facsimiles from the documents actually signed by plaintiff on or about June 8, 1981, and refers to those documents presently held under seal by the United States District Court, Southern District of New York, which evidence the affixation of a facsimile of plaintiff's signature thereto, and evidence defendants' fraudulent intent in respect thereto.

(c) On or after August 3, 1981.

(d) Not applicable.

(e) Plaintiff did not sign such documents.

(f) See Answer to Interrogatory 2, above.

PAVELIC & LeFLORE

By: /s/ Ray L. LeFlore
(A Member of the Firm)
Attorneys for Plaintiff
Northern J. Calloway
919 Third Avenue
New York, New York
10022
(212) 319-7760

I have read the foregoing answers and know the contents thereof, and the same are true to my own knowledge, except as to those matters stated to be upon information and belief, and as to those matters believe them to be true.

/s/ Northern Calloway
NORTHERN J. CALLOWAY

Sworn to before me this
3rd day of June, 1985

/s/ Theodore N. Cox
Notary Public

THEODORE N. COX
Notary Public, State of New York
No. 31-4797851
Qualified in New York County
Certificate Filed in New York County
Commission Expires March 30, 1987

(Affidavit of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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NORTHERN J. CALLOWAY,	:	Index No.
individually and on behalf of	:	82 Civ. 8697
LMN PRODUCTIONS, INC.,	:	(RWS)
Plaintiffs,	:	
-against-	:	
THE MARVEL ENTERTAINMENT	:	PLAINTIFF'S
GROUP, a division of CADENCE	:	PROPOSED
INDUSTRIES CORPORATION,	:	PRE-TRIAL
JAMES GALTON, AL BRODAX,	:	ORDER
MICHAEL S. KLEIN, LUIS QUIROS,	:	
DUMLER & GIROUX, THE SHUKAT	:	
COMPANY, LTD., SCOTT SHUKAT,	:	
PETER S. SHUKAT, ESQ. and, where	:	
necessary, LMN PRODUCTIONS,	:	
INC.,	:	
Defendants.	:	
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THE MARVEL ENTERTAINMENT	:	
GROUP, a division of CADENCE	:	
INDUSTRIES CORPORATION,	:	
JAMES GALTON, AL BRODAX,	:	
LMN PRODUCTIONS, INC., MIC-	:	
HAEL KLEIN and LUIS QUIROS,	:	
Third-Party Plaintiffs,	:	
-against-	:	
DUMLER & GIROUX, THE SHUKAT	:	
COMPANY, LTD., SCOTT SHUKAT	:	
and PETER S. SHUKAT, ESQ.,	:	
Third-Party Defendants.	:	
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Pursuant to this Court's standing Order for trial, plaintiff, Northern J. Calloway ("Calloway"), by his attorneys, Pavelic & LeFlore, herewith proposes the following pre-trial order for trial of the action, captioned above, subject of course to such modifications as may be required by any submissions by, or on behalf of, defendants, third-party plaintiffs and third-party defendants herein.

Because there has been no required mutual exchange by which the parties might agree to limit the issues of fact for trial, this proposed pre-trial order is framed to compel such agreement, based upon the extensive record from pre-trial discovery already had. Should defendants decline to stipulate to facts as to which there can be no dispute, the Court can assess these costs and fees as may be incurred to prove such at trial.

This proposed pre-trial order also anticipates rulings for, and at, trial which will be required as a result of (i) that record, (ii) the Court's prior rulings herein and (iii) all prior representations made by the parties, upon which such prior rulings are based.

Finally, this proposed pre-trial order commends to the Court specific instructions which will be required before, or at the conclusion, of trial to ensure that the jury determines properly the issues in the case.

I. For purposes of the trial of this action, preserving always plaintiff's right of review of any such prior determination of the Court, the pleadings herein are deemed amended in accordance with the Court's prior rulings and most recent decision of February 26, 1986. Based upon such rulings and prior determinations, plaintiff's

Complaint (Restated and Renewed) is annexed as Exhibit A, hereto.

II. Plaintiff agrees that the trial of this action will be based upon this order and upon Complaint (Restated and Renewed).

A. Plaintiff further agrees that in accordance with the Court's prior rulings and most recent decision of February 26, 1986, plaintiff has been precluded and, thus, in effect compelled to abandon for the present all claims against Dumler & Giroux, and claims for monetary damages, as opposed to injunctive relief, against defendant Luis Quiros. Plaintiff is likewise precluded by this Court's Order of February 26, 1986, from pursuing any state law claim against Peter Shukat, The Shukat Company, Ltd. or Scott Shukat which does not arise out of any common nucleus of facts relating to plaintiff's claim of fraud and misrepresentation "in connection with the June 8, 1981 option agreement", and related documents, as such have been previously referred to. Claims there may be, as a result of the proof of such fraud and misrepresentation, for malpractice and breach of fiduciary duty if, at the conclusion of the case, the Court finds that such permissible proof also establishes malpractice and breach of fiduciary duty. Plaintiff has also been precluded and, thus, in effect compelled to abandon for the present all claims of unfair competition and contributory infringement, both as such claims might have been proven, singly, as to any defendant or proven, jointly, as a result of a scheme between and among defendants to do what was alleged was done.

B. Plaintiff submits that defendants' failure of proof in discovery compels abandonment of the following claims:

1. Klein - First, Second, Third and Fourth Counterclaims.

2. Quiros - First (and only) Counterclaim.

III. (a) In view of the extensive discovery already had, constituting in large part party-admissions, as well as the documentary evidence from such discovery, plaintiff believes that the presentation of the case upon formal Agreed Statements of Fact is feasible and advisable; to that end, plaintiff proposes the parties stipulate that the following facts, already a matter of record, are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

THE PARTIES

A. Plaintiff is an individual and citizen of the United States, residing in the City, County and State of New York.

B. LMN Productions, Inc. ("LMN") is a New York corporation with offices in the City, County and State of New York. Since its formation, in 1981, plaintiff was and continues to be a shareholder of LMN.

C. Defendant, The Marvel Entertainment Group ("Marvel") is a division of Cadence Industries Corporation, a New Jersey corporation, with offices at 575 Madison Avenue, in the City, County and State of New York.

D. At all relevant times hereinafter, defendant, James Galton ("Galton"), was an executive officer and authorized agent of Marvel. Each action taken by Galton,

as hereinafter alleged, was done as an agent of Marvel and on its behalf.

E. At all relevant times, defendant, Al Brodax ("Brodax"), was an executive producer and authorized agent of Marvel. Each action taken by Brodax, was done as an agent of Marvel and on its behalf.

F. Defendant, Michael B. Klein ("Klein"), resides in the City, County and State of New York. At all relevant times hereinafter, Klein was an officer, director and shareholder of LMN.

G. Defendant, Luis Quiros ("Quiros"), resides in Larchmont, New York. At all relevant times, Quiros was an officer, director and shareholder of LMN.

H. Defendant, The Shukat Company, Ltd. ("The Shukat Company"), is a New York corporation. From time to time, the Shukat Company has acted, or purported to act, as plaintiff's personal manager in matters involving his artistic endeavors.

I. Defendant, Scott Shukat, ("Shukat") is an individual with offices in the City, County and State of New York. At all relevant times hereinafter Shukat was an officer and authorized agent of The Shukat Company.

J. Defendant, Peter S. Shukat, Esq. ("Peter Shukat") is an attorney admitted to practice in the State of New York, with offices in the City, County and State of New York. From time to time, Peter Shukat has acted, or purported to act, as plaintiff's attorney.

JURISDICTION AND COPYRIGHT

K. In 1979, plaintiff conceived and developed a motion picture project, tentatively entitled "THE SKYRIDER". Thereafter, in consultation with David Steven Roth, plaintiff wrote and caused to be written a formal synopsis, outline and script for "THE SKYRIDER". Plaintiff's creations in "THE SKYRIDER" were intended as an additional source of revenues from merchandizing and licensing in the children's market.

L. The synopsis, outline and script for "THE SKYRIDER" contain a substantial amount of material wholly original, constituting a copyrightable work under the laws of the United States. On or about February 28, 1982, plaintiff and Roth entered into a written agreement confirming (i) that Roth was employed by plaintiff to work for hire on "THE SKYRIDER", and (ii) that all right, title and interest in respect of "THE SKYRIDER" are vested in plaintiff.

M. Since 1979, plaintiff has complied in all respects with The Copyright Act of 1976, securing all exclusive rights and privileges in and to the copyright of such work; since November 2, 1981, all copies of plaintiff's script for "THE SKYRIDER" have provided notice of such copyright, stated as follows:

- (c) 1981 Northern J. Calloway,
David Stephen Roth
(Script)
- (c) 1981 Northern J. Calloway,
(Lyrics)

N. Plaintiff has caused the script for "THE SKYRIDER" to be registered with the United States Register

of Copyrights, effective July 26, 1982, with plaintiff identified as the sole owner of "THE SKYRIDER"; The Register of Copyrights has issued a certificate of registration, dated and identified as follows: "July 26, 1982; No. PAu 423-282".

THE FACTS IN RESPECT OF LIABILITY

O. In March and April 1981, at a series of meetings in New York arranged by Klein and Quiros, plaintiff presented "THE SKYRIDER" to Marvel by displaying and delivering copies of his works and disclosing all other commercial aspects of "THE SKYRIDER".

P. On and after November 3, 1981, Galton and Brodax, with Klein's and Quiros' active participation, wrote and caused to be written a work, entitled "SY RIDER", copied in large part from plaintiff's copyrighted works, using the characters and format of "THE SKYRIDER".

Q. Klein and Quiros have caused Marvel's outline to be displayed to the public without plaintiff's knowledge or consent, and caused its infringing outline to be distributed in the entertainment industry and in the financial community involved with such projects.

R. In the period set forth above, Marvel's outline has been personally displayed and distributed within the United States by the aforesaid defendants to each of the persons identified in Klein's letter and memorandum, dated September 20, 1982.

S. By Written Shareholders Agreement for LMN effective June 8, 1981, the defendants Klein and Quiros

reserved to the plaintiff one artistic decision in respect of the production of "THE SKYRIDER", and imposed upon Klein and Quiros unanimous consent for any decision regarding "which animation houses to use and who shall direct the motion picture." Plaintiff also required, and obtained Klein's and Quiros' consent to, screen credit for plaintiff in any production of "THE SKYRIDER" as the Producer of the motion picture.

T. On or about June 9, 1981, Scott Shukat was solicited to cause The Shukat Company to purport to grant an option for "The Skyrider". The Shukat Company was then plaintiff's manager, retained to advise him in all regards concerning "THE SKYRIDER".

U. On June 9, 1981, without plaintiff's knowledge or consent, Shukat and his company purported to grant to LMN an option to acquire "THE SKYRIDER".

V. The June 9 letter from SCL to Dumler, purporting to grant the foregoing option, gave no right to anyone to change or otherwise modify plaintiff's work, "The Skyrider".

W. The documents described as the option, songwriter's and writer's agreements were all to be held in escrow by Peter Shukat, Esq. as agent for the plaintiff Calloway and Gavin Spencer and were not to be deemed effective unless and until LMN paid to Calloway and Spencer a total amount of \$35,000; nevertheless, such documents were released by Peter Shukat before the payment of any money.

X. On September 3, 1981, September 6, 1981, September 14, 1981, and September 15, 1981, without plaintiff's knowledge, Klein, Quiros, Scott Shukat and Peter Shukat together negotiated, drafted and purported to execute on plaintiff's behalf a series of agreements, purporting to grant to LMN and others additional rights in respect of "THE SKYRIDER".

Y. After consulting with Scott Shukat and in reliance upon Peter Shukat's advice, on February 8, 1982, plaintiff agreed to execute a series of agreements with Marvel pursuant to which Marvel would produce and merchandise world-wide the project created by plaintiff. In order to ensure that all objections by plaintiff to Marvel's involvement in the project were entirely resolved before the agreements became effective, plaintiff instructed Peter Shukat to hold the Marvel agreements in escrow until plaintiff released them.

Z. On February 8, 1982, plaintiff executed the Marvel agreements and placed in escrow with Peter Shukat all copies of the agreements signed by him.

AA. The terms of the escrow agreement accepted by Peter Shukat provided that plaintiff's signature not be deemed effective unless and until plaintiff's continuing objections to Marvel's involvement were resolved to plaintiff's satisfaction.

BB. On or about February 8, 1982, without plaintiff's knowledge or consent, Peter Shukat released all copies of the Marvel agreements signed by plaintiff to Egon Dumler, the attorney for LMN.

CC. Without plaintiff's knowledge or consent, on or about February 9, 1982, Marvel obtained the copies of the agreements signed by plaintiff supposed to be held in escrow.

DD. LMN was formed on or about March 27, 1981 for the single purpose of serving as a vehicle for the financing and marketing of plaintiff's contemplated production of that motion picture, tentatively entitled "THE SKYRIDER". Plaintiff's agreement, effective June 8, 1981, granted to LMN a valuable option, upon stated conditions, to share in the profits and royalties to be derived from "THE SKYRIDER".

EE. In August and September of 1981, LMN successfully raised, and thereafter received, in excess of seventy-five thousand (\$75,000) dollars to fund the pre-production expenses of the project.

III. (b) Based upon the foregoing, for purposes of this order, without waiving any right of review, stated above, and for the convenience of the Court and parties herein, plaintiff's contentions in summary form are set forth below:

FOR a FIRST CAUSE of ACTION, plaintiff contends:

This is an action for damages and injunctive relief, based upon The Copyright Act of 1976 (17 U.S.C.A. §§101 *et seq.*, hereinafter the "Act"). Sections 101, 102 and 501 of the Act provide, in pertinent part, respectively:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later

developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device.

* * *

Subject to §§107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phono records;
- (2) to Prepare derivative works based on the copyrighted work;
- (3) to distribute copies or phono records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending . . .
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works . . . to display the copyrighted work publicly.

Section 501 then states:

- (a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 . . . is an infringer of the copyright.

The Complaint (Restated and Renewed) states:

In 1979, as a natural extension of his involvement in quality children's programming, plaintiff conceived and developed that motion picture project, tentatively entitled "The Skyrider" consistent with his image as "David of Sesame Street." Thereafter, in consultation with David Stephen Roth, plaintiff wrote and caused to be written a formal synopsis, outline and script for "The Skyrider", as a feature length science-fiction musical, with state of the art computerized animation, for children and family

entertainment. Because the story and characters created by plaintiff are both heroic and futuristic, plaintiff's creations in "The Skyrider" were also intended as an additional source of revenues from merchandising and licensing in the children's market.

The synopsis, outline and script for "The Skyrider" contain a substantial amount of material wholly original, constituting a copyrightable work under the laws of the United States.

* * *

As a prerequisite to this action, plaintiff has caused his script for "The Skyrider" to be registered with the United States Register of Copyrights, effective July 26, 1982, with plaintiff identified as the sole owner of "The Skyrider"; plaintiff has since received from the Register of Copyrights a certificate of registration, dated and identified as follows: "July 26, 1982; No. PAu 423-282". A true copy of plaintiff's certificate of copyright registration is annexed as Exhibit B.

* * *

. . . In April 1981, with Klein and Quiros' active participation, upon information and belief, Galton and Brodax embarked upon a scheme and course of conduct designed to misappropriate and use for their own business purposes the characters and general plot of "The Skyrider", as well as the marketing concepts developed by plaintiff.

In furtherance of their scheme as aforesaid, without plaintiff's knowledge or consent, on and after November 3, 1981, Galton and Brodax, with Klein's and Quiros' active participation, wrote and caused to be written a work, entitled "Sy Ryder", copied in large part from plaintiff's copyrighted works, using the characters and format of "The Skyrider".

No part of Marvel's outline was approved or authorized by plaintiff.

At least since April 12, 1982, continuing to the date hereof, upon information and belief, Galton and Brodax and Klein and Quiros have caused Marvel's outline to be displayed to the public without plaintiff's knowledge or consent, and caused its infringing outline to be distributed throughout the entertainment industry and in the financial community involved in such projects, for their own business purposes.

Defendants' unauthorized creation, display and distribution of their inframing work violated plaintiff's rights in respect of "The Skyrider".

FOR a SECOND CAUSE of ACTION, plaintiff contends: Defendants unlawfully used plaintiff's name and business reputation in connection with their infringing work, in violation of New York's Civil Rights Law, §50; defendants' unlawful use of plaintiff's name and business reputation also defamed plaintiff's name and business reputation and violated both the Copyright Act of 1976 and the Lamham Act (15 U.S.C.A. §§ 1051 *et seq.*).

The Complaint (Restated and Renewed) states:

In every regard where plaintiff's copyrighted work was altered by Marvel's outline, the language and scene depictions are offensive to plaintiff because of their vulgar references and stereotypical appeal, and entirely inconsistent with plaintiff's original conception and copyright in respect of "THE SKYRIDER".

As an integral part of their unlawful distribution of "SY RIDER" as a distortion of plaintiff's copyrighted materials, defendants used plaintiff's name and business reputation without plaintiff's knowledge or consent, in a manner seriously detrimental to his image, his career, and his reputation in the field of quality children's programming and in the entertainment industry, generally.

FOR a THIRD CAUSE of ACTION, plaintiff contends: Defendants breached their agreements with plaintiff, competed unfairly with plaintiff, engaged in a scheme to defraud plaintiff and misappropriated "The Skyrider".

The Complaint (Restated and Renewed) states:

On or about June 8, 1981, while Klein and Quiros continued to meet with Galton and Brodax without plaintiff's knowledge or consent, plaintiff and Klein and Quiros entered into a series of agreements, which plaintiff signed and initialed, memorializing their respective rights in connection with plaintiff's intended production of the "THE SKYRIDER".

The agreements referred to above granted, among other things, a limited option, upon stated conditions, for Klein and Quiros to participate in the movie "THE SKYRIDER". The agreements reserved to plaintiff the right to make all artistic decisions concerning "THE SKYRIDER", as well as the right to determine which animation houses to use and who would direct the motion picture.

In furtherance of their scheme, as aforesaid, on or about June 9, 1981, Scott Shukat was solicited to cause The Shukat Company to purport to grant an option for "THE SKYRIDER", on the terms and conditions substantially different from plaintiff's agreements dated June 8, 1981. The Shukat Company was then plaintiff's manager, retained to advise him in all regards concerning "THE SKYRIDER".

On June 9, 1981, without plaintiff's knowledge or consent, Shukat and his company purported to grant to LMN an option to acquire "THE SKYRIDER", on terms and conditions substantially different from plaintiff's agreements dated June 8, 1981.

On or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series

of documents, back-dated to June 8, 1981, purporting to confirm by formal agreement the terms and conditions of a putative option for LMN to acquire "THE SKYRIDER".

On September 3, 1981, September 6, 1981, September 14, 1981, and September 15, 1981, upon information and belief, in furtherance of their scheme, as aforesaid, Klein, Quiros, Scott Shukat and Peter Shukat together negotiated, drafted and purported to execute on plaintiff's behalf another series of agreements, purporting to grant to LMN and others additional rights in respect of "THE SKYRIDER".

Plaintiff did not know or approve of the agreements referred to above, and never authorized anyone to purport to sign such agreements on his behalf.

Defendants also concealed Marvel's outline from plaintiff and affirmatively misrepresented the facts in respect of their unlawful display and distribution of "THE SKYRIDER".

After consulting with Scott Shukat and in reliance upon Peter Shukat's advice, on February 8, 1982, plaintiff agreed to execute a series of agreements with Marvel pursuant to which Marvel would produce and merchandise world-wide the project created by plaintiff. In order to ensure that all objections by plaintiff to Marvel's involvement in the project were entirely resolved before the agreements became effective, plaintiff instructed Peter Shukat to hold the Marvel's agreements in escrow until plaintiff released them.

On February 8, 1982, plaintiff executed the Marvel agreements and placed in escrow with Peter Shukat all copies of the agreements signed by him.

The terms of the escrow agreement accepted by Peter Shukat provided that plaintiff's signature not be deemed effective unless and until plaintiff's continuing objections to Marvel's involvement were resolved to plaintiff's satisfaction.

On or about February 8, 1982, in furtherance of their scheme as aforesaid, without plaintiff's knowledge or consent, Peter Shukat released all copies of the Marvel agreements signed by plaintiff.

From February 1982 through November 1982, defendants continued to conceal from plaintiff the aforementioned documents and all other information necessary for plaintiff to ascertain defendants' efforts to misappropriate "THE SKYRIDER", maliciously distorted the facts in that regard and purposely attempted to mislead plaintiff by false and contrived documentation - all in furtherance of their scheme to misappropriate "THE SKYRIDER".

FOR a FOURTH and FIFTH CAUSE OF ACTION, plaintiff contends:

Defendant, Peter S. Shukat, by his conduct, breached his fiduciary duties to plaintiff and violated his professional obligations to plaintiff, and

Defendant, Scott Shukat and The Shukat Company Ltd., by their conduct, violated their obligations to plaintiff and breached their fiduciary duties to plaintiff.

FOR a SIXTH, SEVENTH and EIGHTH CAUSE of ACTION, plaintiff contends, derivatively, on behalf of LMN Productions, Inc.:

Defendants tortiously interfered with LMN's agreements with plaintiff; and

Defendants, Klein and Quiros, breached their fiduciary duties to LMN and wasted the assets of LMN.

IV. (a) The exhibits which plaintiff expects to offer at the trial are as follows: See Exhibit B.

(b) The deposition testimony which plaintiff intends to offer at trial is as follows:

Name	Date of Dep.	Page #'s used
Egon Dumler	7/22/85	In its entirety
Luis Quiros	7/17/85	In its entirety
James Galton	8/6 and 8/5/85	In its entirety
Peter Shukat	6/25/85	In its entirety
	8/14/85	In its entirety
	10/7/85	In its entirety
	10/31/85	In its entirety
	12/2/85	In its entirety
Lawrence Weiss	8/16/85	In its entirety
Scott Shukat	8/15/85	In its entirety
Michael Klein	7/2/85	In its entirety
	7/3/85	In its entirety
	7/8/85	In its entirety
	7/9/85	In its entirety
Al Brodax	10/29/85	In its entirety
	11/4/85	In its entirety

All other party admissions permitted at trial.

V. The following is a list of witnesses to be called by the parites, including any expert witnesses, together with an offer of proof with respect to the qualifications and testimony of such expert witnesses:

Arnold Liebman
 Cavin Spencer
 David Stephen Roth
 Dulci Singer
 Northern J. Calloway
 W.H.G. Smith, Walt Disney Productions
 (1949-1985)
 Pearl Tytell - Accepted as an expert in the
 Southern and Eastern Districts, and trial courts
 of New York, on numerous occasions;
 qualifications previously supplied.

The plaintiff hereby states its intention to call a medical-psychiatric expert only as a rebuttal witness if the defendants opt, and are permitted, to call an expert to

give extrinsic evidence as to Calloway's mental condition.

VI. The following are all of the claims for damages, counterclaims or cross-claims or for other relief asserted by the plaintiff, in this action, as of the date of this conference.

*Pursuant to the
First Cause of Action*

Damages for: Copyright infringement, destruction pursuant to First Cause of Action and misappropriation of value of copyright and unfair competition in violation of Copyright Act of 1976.

Damages from: The defendants Marvel Entertainment Group, a division of Cadence Industries Corp., James Galton, Al Brodax and Michael Klein, jointly and severally

Damages of:

- (a) not less than ELEVEN MILLION (\$11,000,000) DOLLARS
- (b) A formal accounting, disgorgement of any and all profits realized as a result of infringement and the resonable monetary value of all other benefits obtained
- (c) Statutory damages of \$100,000

And further, from the defendant LOUIS QUIROS and all other foregoing defendants:

- (d) An injunction permanently barring all future unauthorized use of plaintiff's works.

*Pursuant to the
Second Cause of Action*

Damages for: Defendants of plaintiffs' name and business reputation and invasion of privacy in violation of the New York Civil Rights Act and Copyright Act of 1976.

Damages from: Marvel Entertainment Group, a division of Cadence Industries Corp., James Galton, Al Brodax, and Michael Klein, jointly and severally,

Damages of:

- (a) Actual damages of THREE MILLION (\$3,000,000) DOLLARS;
- (b) Exemplary damages, in an amount sufficient to punish defendants and to deter any such future unlawful misconduct, in an amount not less than three-fold actual damages sustained; and

From the defendant LOUIS QUIROS together with the foregoing defendants,

- (c) An injunction, permanently barring all future unauthorized uses of plaintiff's name or business reputation.

*Pursuant to the
Third Cause of Action*

Damages for: Fraud and misrepresentation in the infringement and misappropriation of plaintiff's copyright and unfair competition with plaintiff.

Damages from: The Shukat Company, Ltd., Scott Shukat and Peter Shukat

Damages of: ELEVEN MILLION (\$11,000,000) DOLLARS.

*Pursuant to the
Fourth Cause of Action*

Damages for: Knowing, willful and malicious copyright infringement, wrongful misappropriation and destruction of property, slander and defamation of Calloway's business reputation.

Damages from: Marvel Entertainment Group, a division of Cadence Industries Corp., James Galton, Al Brodax, Michael Klein, The Shukat Company, Ltd., Scott and Peter Shukat,

Damages of: Exemplary, punitive damages to deter future misconduct of not less than three-fold the plaintiff's actual damages

[Fifth and Sixth Causes Precluded by the Court
Subject to Reinstatement at the Conclusion of the
Case in Accordance with Paragraph 2(A)]

*Pursuant to the
Seventh Cause of Action*

Damages for: Unjustifiable interference with the contractual rights of LMN and diminution of the value of LMN's property rights in the Sky rider.

Damages from: Marvel Entertainment Group, a division of Cadence Industries Corp., James Galton, Al Brodax, Michael S. Klein, The Shukat Company, Ltd., Scott Shukat and Peter S. Shukat, Esq.

Damages of: FIVE MILLION (\$5,000,000) DOLLARS.

*Pursuant to the
Eighth Cause of Action*

Damages for: Breach of fiduciary duties to LMN by its attorneys, officers and directors.

Damages from: Michael Klein

Damages of: FIVE MILLION (\$5,000,000) DOLLARS

*Pursuant to the
Ninth Cause of Action*

Damages for: Waste and misappropriation, to their own use by Klein and Quiros of funds belonging to LMN effectively foreclosing the production of the motion picture, "THE SKYRIDER".

Damages from: Michael Klein

Damages of: an amount to be determined.

Finally, should it be determined by the Court and Jury that defendants Marvel, Galton, Brodax, Klein, The Shukat Company, Ltd. and Scott and Peter Shukat did, in fact, enjoy a license from Calloway to appropriate display, deliver to third persons and otherwise alter "THE SKYRIDER" by virtue of alleged agreements dated June 8, 1981 and denominated respectively here as the (a) "Shareholders Agreement" among Calloway, Klein, Quiros and LMN Productions, Inc., (b) "Agreement between Publisher [LMN] and Writer" and (c) Agreement between Producer [LMN] and Calloway, (the "option agreements") and the related and unauthorized September 6, 1981 extension of an option to develop "THE SKYRIDER" entered into by the defendant Scott Shukat and SCL, aided and abetted by Peter Shukat with the alleged knowledge and consent of Calloway; the plaintiff seeks damages in a sum to be determined, but no less than approximately \$443,000 due and owing to Calloway in accordance with the terms of those "agreements" by virtue of the fact that defendants elected to assume artistic control of the development of "THE SKYRIDER", dispensing with the services of Calloway for which he was otherwise to have been compensated and further effectively depriving him of various monies and profits which would have been otherwise due him.

VII. Plaintiff also agrees to the following matters:

- (a) Plaintiff at this time expects to require a minimum of 7 and a maximum of 10 court days.
- (b) Pursuant to Rule 48 of Federal Rules of Civil Procedure and Rule 22 of the Rules of Administration of the Civil and Criminal Calendars Under the Individual Assignment System for the Southern District of New York, the parties have stipulated and agreed that a verdict or a finding by 4 of the six jurors comprising the jury shall be taken as the verdict or finding of the jury.

VIII. The issues to be tried are formulated by the Court with the consent and agreement of the parties as follows:

- (a) Did Marvel, Brodax, Galton, Klein and Quiros infringe on plaintiff's copyrighted work?
- (b) Did Scott Shukat, Peter Shukat, SCL, Marvel, Brodax, Galton, Klein and Quiros defraud plaintiff and misrepresent their actions in regard to the June 8, 1981 option contract?
- (c) Did Marvel, Brodax, Galton, Klein and Quiros defame plaintiff by impairing his business reputation?
- (d) Did Marvel, Brodax, Galton, Klein and Quiros infringe upon plaintiff's right of privacy as otherwise defined by and pursuant to the New York State Civil Rights Law?
- (e) Did Marvel, Brodax, Galton, Klein and Quiros interfere with plaintiff's contractual relations with LMN?

- (f) Did Klein and Quiros breach their fiduciary duties as officers and directors of a corporation, LMN, misappropriate to their own use and otherwise waste the funds of that corporation?
- (g) Was the conduct described in the foregoing paragraphs "a" through "f" willful and malicious so as to merit the imposition of punitive damages?

IX. Previous Substantive Motions:

<i>Date of Decision</i>	<i>Party</i>	<i>Regarding:</i>	<i>Decision</i>
1/31/83	By Defendants	Extend time to Answer	Granted 2/21/83 3/7/83
2/18/83	By Plaintiff (Calloway)	Stay Arbitration Temporary Relief (enjoin arbitration)	Reserved Denied
3/17/83 6/30/83	By Plaintiff By All Defendants	Stay Arbitration Move to dismiss Complaint under FRCP R.'s 8, 9 10, 12(b)(1), 12(b)(1), 12(b)(6), 12(e), 12(f) and 56	Denied Granted with leave to replead
8/10/83	By Defendants	Extend time to Answer	Granted 9/14/83
12/22/83 (Opinion) 1/10/84 (Judgment)	By Defendants	Motion to Dismiss	Granted as to Dumler, SCL, Peter & Scott Shukat
3/8/84	All Parties	Request for more time for discovery	Not signed

<i>Date of Decision</i>	<i>Party</i>	<i>Regarding:</i>	<i>Decision</i>
3/23/84	By Defendants Marvel, Galton Brodax	Request more time to serve third-party complaint and summons	Granted - 45 days
7/8/84	By Defendants Marvel, Galton Brodax, Klein, LMN By Plaintiff	R.56 - Dismiss Amended Complaint Partial Summary Judgment v. Klein, Marvel, Brodax and Galton	Denied Denied
	By Defendants Marvel, Galton Galton and Brodax	v. Luis Quiros Summary Judgement Dismiss Cross-Claim	Denied
	By Defendants Quiros, Klein and LMN	Strike Brodax third-party complaint	Granted
	By Defendants Quiros	9b, 12(b)(e) - dismiss Amended Complaint 12(f) strike parts of complaint	Granted
7/13/84	By Defendants Luis Quiros	Switch counsel	Granted
8/17/84	Al Brodax Peter Shukat	Extend time to Answer for Third-Party Plaintiffs	Granted 8/15/84
10/10/84		Depositions Schedule ordered by Court	

Date of Decision	Party	Regarding:	Decision
10/15/84	By Peter Shukat	Motion for Protective Order	Denied
1/15/85	By Defendant	Motion to Compel disclosure NJC's transcripts (notes or meetings)	Granted
1/16/85		Substitute counsel to Klein	
1/29/85	Third-Party Defendants	Motion to Dismiss 2nd count of third-party complaint 1st count - indemnity claim	Granted as to Dumler Granted Granted as to Dumler
2/7/85	By Plaintiff	Produce diaries <i>in camera</i> - protect plaintiff's rights	Granted
2/12/85	By Plaintiff	NJC and N. Beaulieu's diaries privileged	Granted
2/22/85	By Plaintiff	Return diaries to RLL	Granted
3/12/85	Dumler (Third-Party Defendant)	Motion to Dismiss Claim	Granted

Date of Decision	Party	Regarding:	Decision
4/5/85		Plaintiff answer Interrogatories by Peter Shukat	Granted
		Third-Party Defendant designate handwriting expert	Granted
5/21/85	By Defendant	Plaintiff deposition and give information regarding if criminal past, etc.	Granted
5/28/85	By Defendant	Plaintiff respond to interrogatories by Marvel, Galton and Quiros and Supplemental Interrogatories	Granted
		by Peter Shukat - Defendant awarded \$1,500.00	
5/31/85	By Defendant	Dismiss action vs. Dumler & Giroux	Granted
6/24/85	By Defendant	Motion for contempt vs. plaintiff \$1,500	Granted

<i>Date of Decision</i>	<i>Party</i>	<i>Regarding:</i>	<i>Decision</i>
7/3/85	By Defendant	Plaintiff's failure to disclose expert-handwriting witness regarding genuineness of document will preclude proof at trial unless good cause shown	Granted
8/21/85	By Plaintiff	Appoint Special Master in light of Arnoff throwing ashtray.	Granted
8/27/85	By Plaintiff	Order to Show Cause	Denied - need apply-
	hold Osborne and	regarding cation to Arnoff in contempt not show for deposition	Special Master
9/15/85	By Arnoff	letter regarding memoranda regarding ashtray incident motion to reargue	Denied - 8/21/85 memo not resolve factual disputes
9/26/85	By Plaintiff	Correspondence on behalf of certain defendants once all the prior proceeding had report	Granted
		Recommendations	Granted

<i>Date of Decision</i>	<i>Party</i>	<i>Regarding:</i>	<i>Decision</i>
		of Special Master of 9/19/85 are approved	
		Motion to amend 8/21/85 memo	Denied
12/3/85	By Special Master recommendation	Impose \$418 in costs on plaintiff - not show for Broadax deposition	Granted
2/26/86	By Defendant Luis Quiros	Try to get dismissed based on discharge in bankruptcy	Denied, except no money judgment may be had
2/26/86	By Defendants Marvel, Brodax, Galton, Third-Party Defendant Shukat (Peter)	Confirm recommendations of Special Master discovery-related	Granted, in part Denied in part
2/26/86	By Defendants Marvel and Galton	Serve amended answers - assert affirmative defenses: fair use, apparent authority, unclean hands and estoppel	Granted
2/26/86	By Plaintiff	Stay Pre-trial Order	Granted

<i>Date of Decision</i>	<i>Party</i>	<i>Regarding:</i>	<i>Decision</i>
2/26/86	By Plaintiff	Assert state claims against third-party defendants directly	Granted as to fraud and misrepresentation claim. Denied as to breach of contract, malpractice, breach of fiduciary duty
2/26/86	By Plaintiff	Reject report and recommendation of Special Master	Granted in part, Denied in part
2/26/86	By Plaintiff	Object to Errata Sheet by Michael B. Klein	Granted
2/26/86	By Defendants Brodax & Klein	Object to Errata Sheet by Nancy Beaulieu	Granted

X. Evidentiary Rulings *In Limine* and Otherwise.

The plaintiff, Northern Calloway, by his attorneys, respectfully requests, pursuant to Rule 403 of the Federal Rules of Evidence, the following evidentiary rulings be made, or reconfirmed in anticipation of evidence the plaintiff believes will be offered by the defendants at trial and of issues with which the Court will be confronted.

The probative value of such testimonial or documentary evidence as may be offered with reference to the following matters, among others, would be dwarfed by the resulting prejudice to the plaintiff, effectively depriving him of a fair trial on the merits.

1. The Special Master and this Court, at page 7 of its most recent opinion of February 26, 1986, mandated that "the factual circumstances surrounding the Tennessee incident are unduly prejudicial" and that "... the underlying facts are not [to be] stated."

Accordingly, the plaintiff requests the following preclusionary rulings:

(a) That there be no reference to the fact that the plaintiff Calloway was charged with a criminal offense.

(b) That there be no reference whatever to the fact that Calloway ever appeared in a criminal court (i.e. "Criminal term").

(c) That, to whatever extent, if any, the subject of Dr. Butt's letter characterizing Calloway as "psychiatrically disabled" should arise, there be no reference to the office of the United States Attorney, the Grand Jury,

or the matter under investigation, particularly since Calloway had been advised he was only a witness and not a target and was never charged with an offense. To do otherwise would cast Calloway in the role of a criminal under investigation hiding behind his psychiatrist and irreparably prejudice him by suggesting unspecified wrongdoing on his part.

2. The Plaintiff requests that, in the absence of an appropriate voir dire, conducted out of the presence of the jury, establishing an independent and scientific good faith basis, no question be put any witness suggesting that any particular medicine or pharmaceutical substance, including but not limited to lithium, was taken by Calloway or impaired his memory or other mental ability; absent a clear showing that Calloway did in fact take the particular drug during a relevant period and that it does impair memory or other mental ability.

3. Precluding, absent an appropriate voir dire and establishment of relevance, any question or evidence purporting to elicit whether or not Calloway ever articulated a belief that the defendant Klein was "trying to poison him".

4. Precluding extrinsic and collateral evidence - as opposed to cross examination of Calloway, as to Calloway's mental condition. Should such evidence be permitted, it can well be anticipated that the plaintiff would present contrary evidence and testimony, "thus creating a trial within a trial". See *United States v. Moten*, 564 F.2d 620, 629 (2d Cir. 1977).

*Proposed Voir Dire Questions
For The Jury Panel*

The plaintiff Northern Calloway, by and through his attorney, Ray L. LeFlore, respectfully requests the Court to describe for the prospective jurors the general nature of case and respective contentions of the parties inquiring as to whether these pose any problems for them for any reason and to further include the following among its usual, background questions to the jury panel:

1. Ladies and Gentlemen, I realize that some of the questions the Court puts to you are of a personal and confidential nature, but they are useful in assuring both the plaintiff and the defendants a fair trial. Accordingly, I will permit each of you, should you so desire to approach the bench or respond in my robing room to the following question:

Have you or any relative or close friend ever been under the care of a psychiatrist or other mental health care professional? For how long?

2. Do you believe that people in the creative arts are just as entitled to be compensated for the value of their intellectual property, that is to say their ideas, as are those who work with their hands and create a physical product?

The plaintiff may also request that the following question be put to prospective jurors:

3. There may be evidence in this case about the mental condition of one or more of the witnesses at or about the time of the events in question at trial. Do you believe that a person who has suffered a mental illness may nonetheless be capable of accurately perceiving and relating in court certain events in which he or she played a role?

*Plaintiff's Request for Preliminary
Pre-Trial Jury Instructions*

The plaintiff, Northern J. Calloway, by his attorney Ray L. LeFlore respectfully requests that the Court include the following in its regular pre-trial instructions to the jury:

Instruction No. 1

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiff Northern Calloway, and the answers thereto of the various defendants. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as I state it to you, and reach a just verdict, without regard to irrelevant matters.

This case should be considered and decided by you on the facts. The law is no respecter of any particular person, all persons stand equal before the law this Court, and are to be dealt with as equals in a court of justice.

*Plaintiff Requested Pre-Trial
Instruction No. 2*

The plaintiff may, at its option, further request the Court to charge the following:

You may hear evidence during the trial concerning the mental condition of the plaintiff, Mr. Calloway, at the time period about which he testifies. I will instruct you at

the conclusion of the trial in greater detail as to the relevance of such evidence. For the present, let me just tell you that you may consider such evidence, should you wish to do so, solely on the issue of his credibility; as you must evaluate the credibility of every witness. This is the only purpose for which such evidence may be admitted, and you may give it such weight as you believe it deserves. I caution you, however, that the issues before you are whether the defendants did or did not infringe on the defendants' copyrighted literary material, and engage in other related acts of fraud and wrongdoing which the plaintiff alleges. To prevail, the Plaintiff must prove his claims by a preponderance of the evidence as I will define that term for you, and his credibility is one factor you may consider in evaluating all of the evidence; but the plaintiff is not on trial here, and his mental health is not the central issue in this case.

Plaintiff's Requested Pre-Trial Instruction

No. 3

Question Not Evidence

Evidence is a question coupled with an answer. A question by itself is proof of nothing, even if it sounds as if the attorney asking the question must know something you don't. As members of the jury, you may not presume the truthfulness of what any attorney may assume in his question unless the assumption is supported by proof in the record. Adapted from *United States v. DeFillipo*, 590 F.2d 1228 (2d Cir. 1979) cert. denied 100 S.Ct. 2844 (1980).

See also *United States v. Harris*, 542 F.2d 1283, 1307 (7th Cir. 1976) cert. denied, sub nom., *Clay v. United States* 430 U.S. 934.

Plaintiff's Requests To Charge

The plaintiff respectfully requests that the Court include the following in its charge to the jury:

Plaintiff's Request No. 1

I instruct you as a matter of law that the copyright laws of the United States forbid any alteration of a protected work by anyone other than the holder of the copyright or his properly authorized licensee. Therefore, if you find that the defendants did in fact, change and alter "THE SKYRIDER" with their "SY RIDER" concept or in any other way not contemplated and authorized by Calloway it does not matter whether or not you believe the change was good or bad, whether it improved the work or hurt it; you must find for the plaintiff on the copyright infringement claim.

Plaintiff's Request No. 2

You have heard evidence on the contested issue of whether the plaintiff Calloway intended to sign and signed the documents I refer to collectively as the "June 1981 Option Agreements" that is the option, writer's and songwriter's agreements plaintiff's Exhibits __, __, and __ in his personal capacity as Northern Calloway, copyright owner of "THE SKYRIDER", as the defendants claim or intended to sign

and signed on behalf of Netta Productions, Inc., the Corporation. The defendant SCL, Inc., Scott Shukat's Company had no management agreement or other authority whatever to bind or act on behalf of Netta Productions, Inc. Accordingly, I instruct you that if you find that Calloway signed on behalf of Netta or was misled by his attorney, the defendant Peter Shukat into believing that he was signing for Netta, then you must conclude that neither the defendant Scott Shukat nor SCL had authority to act as they did and thus must find for the plaintiff Calloway on the question of fraud.

Plaintiff's Request No. 3

You have heard evidence on the contested issue of whether the plaintiff Calloway signed the June, 1981 "Option Agreements" the option, writer's and songwriter's agreements in his personal capacity, that is to say simply as the copyright owner, Northern Calloway, or whether, he signed on behalf of Netta Productions, Inc. as an officer thereof. I instruct you, that even if you find that Calloway signed those agreements in his personal capacity as alleged by defendants and not on behalf of Netta Productions, Inc. you must find, I instruct you as a matter of law, that according to those agreements and Calloway's management agreement with Scott Shukat and SCL, Calloway nevertheless still maintained complete artistic control over the "THE SKYRIDER".

Plaintiff's Request No. 4

Management Agreement

I instruct you as a matter of law that plaintiff's exhibit __ a May 31, 1980 management agreement

between Mr. Calloway in his personal capacity and Scott Shukat's management company, SCL, contains only a limited power of attorney for SCL to act on Mr. Calloway's behalf and did not give SCL the power to transfer any right, title or interest in "The Skyrider" to anyone nor to authorize anyone to change it.

Plaintiff's Request No. 5

I charge you, as a matter of law, that the defendant Marvel Entertainment could not acquire from the defendants LMN, Inc. Klein and Quiros any right title or interest in "THE SKYRIDER" which LMN, Klein and Quiros did not themselves possess. I further instruct you that neither Klein, Quiros nor LMN, on the facts here in issue, ever obtained from Calloway the right to change, or authorize others to change, "THE SKYRIDER".

Plaintiff's Request No. 6

Certain contested documents to which I have already referred, have been received in evidence and have been the subject of testimony and argument in this case. These are plaintiff's exhibits ___, ___ and ___, the so-called June 1981 "option agreements".

As you know, one of the issues of fact in the case is whether the documents were signed and intended to be signed by Calloway in his personal capacity as owner of the copyright in "The Skyrider" or in his representative

capacity acting on behalf of the corporation, Netta Productions Inc. for his personal services.

That question of fact, among others, is for you and you alone to decide. You are the sole judges of the facts.

I do want to explain to you, however, the legal significance of certain words and phrases which appear in those writings in evidence as this might assist you in your factual determination. Exhibits ___ and ___, the writers and songwriter's agreements, each contain a page which begins with the words "Northern Calloway represents" and which bears Calloway's signature. In each of the agreements, Calloway promises to perform the agreement "between Netta Productions Inc. for his services . . . and LMN Productions, Inc. . . . as if he were personally making the promises contained therein".

The words of the document speak for themselves. I instruct you as a matter of law, however, that such a "representational page" would have no legal purpose unless it were attached to an agreement Calloway signed or one originally intended to be signed on behalf of the corporation, Netta Productions Inc. and would be entirely unnecessary if Calloway signed, or believed he was signing in his personal capacity.

Likewise, to the extent you may find the signature page of the writer's and songwriter's agreements to have or have had the word "by" next to a signature, I instruct you that such a format is typically employed when the signator is signing on behalf of a third party; that is a corporate entity or third person on whose behalf he is entitled to act.

Plaintiff Request No. 7

Escrow

Should you find that any legal documents in this case were placed in escrow by the plaintiff, that is to say, given to someone to hold for safekeeping until certain conditions were met or events took place, and that such escrow was accepted by a defendant; I instruct you as a matter of law that any agreement in such documents cannot be found by you have ever had any legal effect unless you also find that the terms of the escrow arrangement were fully met and satisfied.

In other words, if such documents were released by a defendant to another defendant prematurely, or in violation of the escrow arrangement, the documents cannot have any legal effect.

Plaintiff's Request No. 8

Duty to Inquire

I instruct you, as a matter of law, that the defendant Marvel Entertainment Group had an obligation and duty to inquire of its co-defendants LMN Productions, Inc., Michael Klein and Luis Quiros to fully ascertain the legal basis on which LMN, Klein and Quiros purported to base

any authority to grant to Marvel any alleged license concerning "The Skywriter".

Plaintiff's Preliminary Request

For Jury Instructions

The plaintiff Northern Calloway additionally requests the Court to instruct the jury in its usual manner with reference to the following matters of law:

1. Elements of the various causes of action.
2. Respective functions of the Court and Jury.
3. Burden of Proof – What plaintiff must prove and is *not* required to prove – Preponderance of the evidence.
4. Affirmative defenses: obligations of defendants.
5. Circumstantial evidence and inferences which may be drawn therefrom.
6. Credibility of witnesses
7. Expert witnesses:
 - handwriting
 - medical
8. Minor variance in dates, times and amounts irrelevant.
9. The concept of Agency.

Yours, etc.,

Pavelic & LeFlore

By /s/ Ray L. LeFlore
 (A member of the Firm)
 Attorneys for Plaintiff
 Northern J. Calloway
 919 Third Avenue
 New York, New York 10022
 (212) 319-7760

(Exhibits and Affidavit of Service omitted in printing)

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

_____ X
 NORTHERN J. CALLOWAY, :
 individually and on behalf of :
 LMN PRODUCTIONS, INC., : 82 Civ. 8697
 : (RWS)
 Plaintiffs, :

- against -

THE MARVEL ENTERTAINMENT :
 GROUP, a division of CADENCE :
 INDUSTRIES CORPORATION, :
 JAMES GALTON, AL BRODAX, : AFFIDAVIT
 MICHAEL S. KLEIN, LUIS :
 QUIROS, DUMLER & GIROUX, :
 THE SHUKAT COMPANY, LTD., :
 SCOTT SHUKAT, PETER S. :
 SHUKAT, ESQ., and where neces- :
 sary, LMN PRODUCTIONS, INC., :
 Defendants. :

_____ X
 THE MARVEL ENTERTAINMENT :
 GROUP, a division of CADENCE :
 INDUSTRIES CORPORATION, :
 JAMES GALTON and A. :
 BRODAX, :

Third-Party Plaintiffs,

- against -

DUMLER & GIROUX, THE :
 SHUKAT COMPANY, LTD., :
 SCOTT SHUKAT, PETER S. :
 SHUKAT, ESQ., :

Third-Party Defendants. :

_____ X

STATE OF NEW YORK)
 :SS.:
COUNTY OF NEW YORK)

NORMAN B. ARNOFF, being duly sworn, deposes and says:

1. I am an attorney at law and a member of the firm of Arnoff & Merin, P.C., attorneys for third-party defendant and defendant Peter S. Shukat, Esq. ("Shukat").

2. I make this affidavit in support of Shukat's motion for sanctions pursuant to the inherent powers of the Court, 17 U.S.C. § 505, 28 U.S.C. § 1927, and Rule 11 for reimbursement of attorneys' fees, expert witness fees and other costs of litigation against plaintiff's counsel, Ray LeFlore, Esq. ("LeFlore") and the law firms of LeFlore & Egan and Pavelic & LeFlore.

3. Shukat also joins in the motions of the other defendants for the facts and reasons stated in their papers, including their reliance on the inherent powers of the Court, 17 U.S.C. § 505, 28 U.S.C. § 1927 and Rule 11.

4. Trial was commenced in the above matter on April 7, 1986 and concluded with the unanimous verdict on behalf of all defendants on May 15, 1986.

5. The nature of the charges against Shukat, the discovery abuses by plaintiff's counsel, LeFlore, and his law firm, and the evidence at trial amply demonstrate that LeFlore instituted the law suit against Shukat in bad faith and, even more significantly, maintained it in bad faith when the dictates of conscience and honor would have long before caused a professionally responsible and honest lawyer to cease to pursue the action.

6. The lawsuit was commenced in December 1982. The lawsuit that was commenced did not contain any specifically worded charge that Shukat forged, altered or placed facsimile signatures on the June 8, 1981 contracts or made any specific fraudulent oral misrepresentation, as was submitted to the jury, to wit, claims that (a) Shukat fraudulently induced plaintiff to execute the June 8, 1981 contracts by lying to plaintiff, Northern J. Calloway ("Calloway") that he was executing the agreements on behalf of Netta Productions, Inc. ("Netta") instead of himself, as an individual; (b) Shukat lied to Calloway that he would hold the three (3) June 8, 1981 contracts in escrow when he had no intent to perform such stated obligation; (c) Shukat lied to Calloway on Labor Day, September 7, 1981, when he allegedly said the "front money" was in the bank on September 5, 1981 in order to extend and keep alive the LMN option; and (d) Shukat lied to Calloway in February 1982 when he allegedly said he would hold secure in *his* escrow the Marvel agreements pending satisfaction of certain conditions and that he had no intent to create or perform the conditions of such an escrow.

7. The December 1982 complaint was signed and certified by the plaintiff's counsel, LeFlore. Subsequent to his retention in August 1982 and prior to his commencement of the lawsuit in December 1982, LeFlore spoke to Shukat. He made no inquiry of Shukat concerning the facts and circumstances surrounding the drafting and execution of the June 8, 1981 contracts or any possible charges against Shukat for forgery, fraudulent alteration, false representations or even malpractice. Instead, LeFlore threatened Shukat with disbarment when Shukat

refused to release his files on the grounds that he was asserting an attorney's lien because Calloway had an unpaid invoice to him of approximately \$8,600. (TR, pp 3488-3491, 3505-3506).

8. In July 1983, an amended complaint was signed and certified by LeFlore and it contained the specific allegation, Paragraph "52," which alleged that Shukat affixed improperly a facsimile signature on the June 8, 1981 agreements of Calloway's. The complaint did not contain any charges of oral misrepresentation by Shukat, as were later on alleged and were tried before the jury.

9. The December 1982 complaint had been dismissed by decision dated June 30, 1983. The July 1983 complaint had been dismissed as to Shukat by decision dated December 22, 1983 for failure to state federal claims.

10. Upon Shukat's dismissal as a party defendant, other defendants, the Marvel Entertainment Group ("Marvel"), James Galton ("Galton") and Al Brodax ("Brodax"), impleaded Shukat. By decision dated January 29, 1985, that impleader was sustained by the Court because of the specific allegations contained in Paragraph "52" of the July 1983 complaint. The Court held that the allegation

that all the third-party defendants participated in changing the agreement of June 8, 1981, and executed agreements extending LMN's rights and that Peter affixed Calloway's signature, all without Calloway's knowledge or consent "was" adequately pleaded with respect to . . . Peter.

11. Further, the Court held in the foregoing decision in respect to the third-party complaint's tracking of the allegations of the main complaint that it

alleges a knowing violation by Peter and Dumler of what has been referred to, somewhat loosely, as the escrow agreement "and-that" Peter owed no duty to Marvel or LMN and absent a knowing misrepresentation, Peter would have liability, if any, only to his client, Calloway . . . [O]f course, that pendant state claim has been dismissed.

12. It is manifest, therefore, that the lawsuit against Shukat, after the initial motions and decisions on the motions, was maintained through April 1, 1986 on the very specific theory that he, Shukat, was guilty of a species of forgery i.e., placing a facsimile signature on the June 8, 1981 documents and/or document tampering. This is evidenced by the fact that as late as January 28, 1986, by Order to Show Cause, the July 1983 complaint, specifically, *including paragraph 52*, was reserved by LeFlore in his effort to bring back into plaintiff's case all prior state law claims previously dismissed.

13. In April 1984 Calloway swore to an affidavit drafted by LeFlore in opposition to the defendants' motions for summary judgment, which affidavit claimed that Shukat contrived the June 8, 1981 contracts, perhaps forged by unidentified others, and then, in another separate and distinct paragraph, claimed the June 8, 1981 contracts were actually forged by the defendants.

14. In November 1984, Pearl Tytell, a document examiner, examined the June 8, 1981 contracts, the Egon Dumler ("Dumler") original set, and three (3) checks with five (5) signatures of Calloway furnished by LeFlore and opined that the June 8, 1981 contracts were probably signed by the same person and possibly by the signer of the checks, Northern J. Calloway. (TR. 1766-1767, 1815-1816).

15. She testified that she never entertained a thought that the signatures were "facsimile", nor did she conclude that they were non-genuine signatures, signatures which, in "legal" language, would be referred to as forged signatures. Nor did she have any actual proof of any other impropriety, to the contrary. (TR. 1744-1752, 1753-1757, 1763, 1795, 1798-1802, 1804-1810, 1815-1816).

16. Ms. Tytell further testified in response to questions put in a deposition upon oral questions, which was reconfirmed at trial, as follows:

Q. Have you ever examined a document with a signature above the printed words "Northern J. Calloway" or "Northern Calloway" that in your opinion did not contain his signature?

A. I do not recall that, Sir.

...

Q. Did Mr. LeFlore ask you whether any of the signatures on the documents he gave you were Mr. Calloway's signature or not?

A. Yes.

Q. Did You answer that question?

A. Yes.

Q. What was your answer?

A. That Based on what my examination was that it appeared to have been written by one person . . . *

*While Miss Tytell, who was paid \$6,000 up to her court appearance, cutely and crudely minced her words, there is no question that the inescapable inference of her sworn answers is

(Continued on following page)

...

Q. That was your conclusion in 1984, was it not?

A. Yes, Sir.

Q. You told Mr. LeFlore that in 1984, did you not?

A. I told him that I believed that was possibly true.**

(DEPOSITION TR. 4/8/84 - pp 125, 128-130).

17. Notwithstanding the fact that LeFlore never had a basis to believe from a handwriting and document examiner that the signatures were non-genuine and, in November 1984, that he was the recipient of an opinion from Ms. Tytell, that the signatures were "possibly" or "probably" written by Calloway, Paragraph "52" was not withdrawn from the case until shortly before the case was submitted to the jury.

18. The sole basis upon which the plaintiff made the claim of placing Calloway's facsimile signature on the June 8, 1981 contracts against Shukat was as follows:

A. Shukat supposedly had *exclusive* access to the June 8, 1981 contracts during the date of their preparation, execution and circulation.

(Continued from previous page)

that "one person" was the writer of the checks furnished by LeFlore. The "one person" was none other than Calloway, and LeFlore was given this message. If there is any doubt to the logical mind of this proposition, the fact that she never furnished a written opinion on the genuineness of the signature is ample demonstration.

**To Ms. Tytell "possible" and "probable," at least in this case are interchangeable terms (TR. p. 1766).

B. LeFlore exhibited to Calloway photocopied June 8, 1981 contracts in LeFlore's office in October 1982 after production by Dumler, for the purpose of indicating the genuineness of signatures, although Calloway acknowledged he had difficulty in recognizing and identifying his own signature.

C. LeFlore and no one else told Calloway the signatures were forged.

(TR. 1291-1294, 1295-1303, 1305-1308, 1322-1327, 1327-1332, 1225-1339, 1591-1598).

19. It was and should have been obvious that Shukat did not have exclusive control over the June 8, 1981 contracts. Dumler was involved in their drafting and execution as much as anyone else, and the documents that were initially provided to LeFlore in the fall of 1982 by Dumler, as well as circulated among all counsel throughout the discovery phase, demonstrated that the June 8, 1981 contracts were executed in August, 1981, either in Scott Shukat's office or in Dumler's office, prepared in Dumler's office and picked up by Calloway on or around August 7, 1981 from Dumler's office.

20. Commencing in the spring of 1985, a series of interrogatories addressed to the plaintiff were served by Shukat in order to pin plaintiff's claims down concerning the non-genuineness of the signatures, the claims of fraudulent alteration of the documents and the substance of expert opinion concerning the genuineness of the June 8, 1981 documents. Meaningful answers were never forthcoming, even at the commencement of the trial and, in fact, sanctions were imposed, including a preclusion order on the use of expert opinion by the plaintiff. The disability of such preclusion order was relieved by the

"grace" of the Court, rather than any proper showing by the plaintiff, as the Court initially prescribed (Initial Set of Interrogatories dated March 19, 1985; Court Order dated April 5, 1985; Shukat's counsels' letter dated April 26, 1985; Answer and Objections to the First Set of Interrogatories dated April 22, 1985; Affidavit of Norman B. Arnoff, Esq. dated May 22, 1985 and exhibits; Order dated May 21, 1985; Decision and Order dated May 28, 1985 including those for sanctions for plaintiffs' counsel's discovery abuses; Plaintiffs' Answers to Supplemental Interrogatories dated June 3, 1985; Order of July 3, 1985 including preclusion of handwriting testimony unless for good cause shown subsequent to Order; Special Master's letter and Rulings dated September 9, 1985, ¶ 1, p. 1; Special Master's letter and Rulings dated September 9, 1985; Special Master's Rulings dated December 6, 1985, ¶ 4, p. 3; Special Master's Rulings dated December 11, 1985, ¶ 2, pp. 2-3; Special Master's letter, Rulings and Comments dated January 29, 1986; Letter of Robert Blum, Esq. dated February 14, 1986; Letter and Rulings of Special Master dated March 4, 1986).

21. On June 21, 1985, counsel for the defendant Shukat wrote to plaintiff's counsel LeFlore that if Paragraph "52" was withdrawn, no Rule 11 sanctions would be preferred. (See letter dated June 21, 1985, attached as Exhibit A to this affidavit.) Most significantly, also on July 10, 1983, in a written opinion, Paul Osborn ("Osborn"), a noted handwriting and document expert, opined that the signatures of Calloway on the June 8, 1981 contracts were genuine. That opinion was distributed to the plaintiff and all other counsel. Still, LeFlore did not cause plaintiff to withdraw the "forgery" and

document tampering claims against Shukat (*see* letter dated July 12, 1985, attached as Exhibit B to this affidavit).

22. As the case proceeded to trial, it must have become apparent to LeFlore that no claim of forgery, imposition of facsimile signature or document tampering could properly be asserted and proven against Shukat, and in consequence, the aforestated claims of fraudulent oral representation concerning the June 8, 1981 contracts and the February 1982 Marvel agreements were asserted for the first time in the lawsuit in a letter by LeFlore's co-counsel, Ray Levites, on April 1, 1986, supplementing the prior claims against Shukat. Note should be made that the prior claims concerning forgery and document tampering were not deleted at that juncture one whit from any of the prior pleadings, including Paragraph "52" of the amended complaint.

23. The claims of oral misrepresentations, a stale afterthought, clearly evidenced LeFlore's bad faith. Knowing the "jig" was up, or soon to be up, with respect to the claims of "forgeries" and document tampering which maintained Shukat in the lawsuit as a party, he reached for another theory never before asserted. This new theory of fraudulent oral misrepresentations also demonstrated LeFlore's bad faith from the outset, as well as throughout, since the charges of forgery and document tampering were totally inconsistent with and fully belied the charges of fraudulent oral misrepresentations.

24. A charge that one signs an agreement because another lies to him is an admission that the signature is true and the document is what it purports to be. A charge

that one never signed a document or that it was altered after signature is a concession that one did not sign the agreement in its present form.

25. The two (2) contentions of the plaintiff, asserted through his lawyer LeFlore, that he signed but was lied to and that he did not sign the June 8, 1981 contracts exhibited in the proceeding and at trial, were mutually exclusive propositions, which form a proposition of indisputable truth that both sets of claims were illogical as well as false.

26. The charges of oral misrepresentation were properly rejected by the jury. They should never have been asserted on behalf of Calloway by his attorney if true professional responsibility had been exercised by LeFlore. Logic and common sense dictated that Calloway did not review the June 8, 1981 contracts on June 7, 1981, a Sunday, in Shukat's office; he did not rely upon an immaterial representation that the June 8, 1981 contracts were being signed on behalf of a corporate party, Netta; that Calloway was not wronged by Shukat in connection with anything that Shukat did with the June 8, 1981 contracts, especially after Calloway's receipt of his share of the front money (i.e. \$28,500) in September 1981 without any tender back of the sums received; that Calloway was not lied to by Shukat on September 7, 1981, Labor Day, that the front money was in the bank on September 5, 1981; and that there were no oral misrepresentations by Shukat to Calloway concerning a non-existent escrow between Calloway and Shukat concerning the Marvel agreements, but that the documentary evidence revealed a proper escrow between Shukat and Dumler, which

Shukat had every right to expect that Dumler and Calloway's other partners would properly perform.

27. The foregoing demonstrates that plaintiff's counsel LeFlore attempted to keep Shukat in this case by a phony claim of "forgery" and document tampering, which he either had no basis in fact to believe or, to the contrary, was informed was not true.

28. The evidence of Calloway at trial was that LeFlore coached Calloway by exhibiting to him *photocopied* documents and misled him to believe that a document and handwriting examiner confirmed the fact of forgery in connection with the June 8, 1981 contracts, thereby inducing the susceptible and misguided Calloway into maintaining a suit against his former lawyer that should never have been brought or prosecuted. Shukat was the lawyer for LeFlore's new client, Calloway. Calloway, unqualifiedly, on June 24, 1982, wrote a letter of "eternal gratitude" to Shukat for prior services as well as friendship. (TR. pp 1287, 1587-1590).

29. LeFlore kept secret the information and opinions that were revealed by his own document examiner, which an honest man would have acted upon by certainly discontinuing the lawsuit against a brother lawyer for the serious claim asserted, and which claim, by necessity, had to have significant repercussions for his fellow professional's reputation in the community.

30. Attached hereto as Exhibit C is a letter from Andrew Valero, Esq., Claims Attorney for American Home, confirming the fact that \$227,611.93, as described, were expended in the defense of Shukat in the above-entitled matter.

31. Attorneys' fees and other litigation costs in the amount of \$227,611.93 should be awarded to Shukat by this Court.

32. Shukat was defended pursuant to a professional liability insurance policy issued by the American Home Assurance Company ("American Home"). Professional liability is not only indemnity coverage but litigation insurance. There is today a crisis in professional liability insurance. The premiums for the professions have multiplied substantially. Many law firms have not been able to obtain coverage for their specialities. This is a result of the fact that for every dollar of loss that is paid out, approximately four (4) dollars for defense costs are spent. These defense costs are a tax for every member of the profession who participates in the professional liability program, which are becoming increasingly fewer in number.

33. Your deponent guess-estimates, from just general discussion with other attorneys in this matter, that the defense costs in fending off this baseless lawsuit aggregate close to one million dollars or more. Even if this Court imposes the sanction, it is anticipated that full reimbursement will not in reality be made and, most certainly, will be avoided, judging by the target of the intended relief. In the last analysis, the bar may have to absorb the wasteful costs of this foolish litigation.

34. This case has been a disservice to the administration of justice, as a result of the misconduct of plaintiff's counsel, who, ironically, in one of the earliest arguments in 1983 made to the Court during pre-answer motions,

averred most strenuously that there was "serious misconduct" by the defendants and, especially, against Shukat. Accordingly, this Court is not only urged to make every effort to make Shukat and his professional liability insurer whole by well fashioned remedies, but to write an opinion with the full authority of the law that only a United States District Court Judge, having presided at the trial of such suit, is fully capable of expressing - that the bringing of such lawsuits must be punished as well as stopped.

WHEREFORE, your deponent respectfully requests that the Court issue relief as prayed for, including attorneys' fees and litigation costs, to the defendant in the amount of \$227,611.93, and to grant such other and further relief as to this Court may seem just and proper.

/s/ Norman B. Arnoff
NORMAN B. ARNOFF

Sworn to before me this
12th day of June, 1986.

/s/ Margaret A. Chismin (Illegible)
Notary Public

EXHIBIT A

June 21, 1985

BY HAND

Ray L. LeFlore, Esq.
919 Third Avenue
New York, New York 10022

Re: *Northern J. Calloway v. The Marvel Entertainment Group, et al. v. Dumler & Giroux et al.* 82 Civ. 8697 (RWS)

Dear Mr. LeFlore:

This will confirm that you are unavailable for Peter Shukat's examination on June 21, 1985 A.M. but available June 25, 1985 A.M. Mr. Shukat will be produced for his deposition at that time at the Courthouse.

Further, this will confirm in writing the position stated orally by your associate on June 20, 1985 at the Courthouse, that your office is *not* complying with Judge Sweet's directive to identify your expert document examiner and turn over his (her) written report *or* identify the expert and make him (her) available for deposition. Absent compliance with Judge Sweet's directive, the undersigned will object to any expert proof offered by plaintiff at time of trial or in response to dispositive motions, on the issue of the genuineness of the documents in issue in the case.

I reiterate the undersigned's offer *not* to move, pursuant to Rule 11 of the Federal Rules of Civil Procedure ("FRCP"), against you personally, as well as your client, for attorneys' fees and costs, *provided that* all allegations against Peter Shukat, Esq. to the effect that he was responsible for forging, altering and placing facsimile signatures on disputed documents in issue in the above-captioned litigation

are, formally and in writing, withdrawn by close of business June 21, 1985. This offer should be communicated to your client and responded to formally and in writing.

Very truly yours,

Norman B. Arnoff

NBA:ikk/nba

cc: Honorable Robert W. Sweet
All Counsel
Peter Shukat, Esq.

EXHIBIT B

July 12, 1985

TO: All Counsel

Re: *Northern J. Calloway v. The Marvel Entertainment Group, et al. v. Dumler & Giroux et al.* 82 Civ. 8697 (RWS)

Gentlemen:

Enclosed please find a copy of the expert's report on the disputed documents, which indicates that Calloway signed, in his own hand, the documents that have been described and maintained in the Court's possession as the "disputed documents." Plaintiff's counsel and counsel for the third-party plaintiffs are urged to withdraw any claims that Peter Shukat, Esq. forged, altered or placed facsimile signatures on the disputed documents.

Thank you.

Very truly yours,

Norman B. Arnoff

NBA:ikk/nba

cc: Honorable Robert W. Sweet

EXHIBIT C

June 13, 1986

Direct Dial 212/770

Norman B. Arnoff, Esq.
Arnoff & Merin, P. C.
342 Madison Avenue
New York, N.Y. 10017

Re: Your File: #AA-1497-9841197
Insured : Peter S. Shukat
Policy : Lawyers Professional Liability
LPL 984-1197

Northern J. Calloway, individually on behalf of LMN Production, Inc., plaintiffs, v. The Marvel Entertainment Group, a division of Cadence Industries Corporation, James Galton, Al Brodax, Michael S. Klein, Luis Quiros, Dumler and Giroux, the Shukat Company, Ltd., Scott Shukat, Peter S. Shukat, and where necessary, LMN Productions, Inc. 82 Civ. 8697

Dear Mr. Arnoff:

This will confirm that American Home Assurance Company (the "Company") from January 12, 1984 through May 16, 1986, has incurred and/or is about to incur, in the defense of the above-captioned action, an aggregate of legal fees, expert witness fees and disbursement of \$227,611.93.

Our file reflects payments fairly allocable for legal fees for 1983 and 1984, including conferences with the client and other counsel, drafting and preparation of the motion to dismiss the third-party complaint, conferences and arguments before the Court, as well as other work was \$15,500.00

For the period 1984 through the end of 1985 our file reflects the fairly allocable legal fees were \$54,235.50, and they included the taking and attendance at depositions, review of the many documents in the case, working with the handwriting and psychiatrist expert, the making of discovery motions, and legal research on the issues in the case, as well as attendance at Court and conferences.

For the period January 15, 1986 through the end of the trial, May 15, 1986, our file reflects excluding the preparation of the Rule 11 motion and motion for reimbursement for fees and costs, to the fairly allocable fees of \$81,365.00.

Our file reflects for the four (4) years, disbursements, including court reporting costs, paralegal fees, photocopying, postage, messenger service, came to the aggregate amount of \$19,858.10.

Our file reflects the Special Masters fees aggregated to defendant and third-party defendant Peter Shukat, our insured, the amount of \$2,037.07.

Expert fees, both for consulting and witnesses for Dr. Charles C. Rohrs and Mr. Paul Osborn, amounted to \$24,507.00.

In summary, the aggregate defense cost in the above matter to date has been \$227,611.93, which includes invoices submitted and properly due.

Thank you.

Very truly yours,

/s/ Andrew C. Valero
Andrew Valero

AV:hg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORTHERN J. CALLOWAY, :
individually and on behalf of :
LMN PRODUCTIONS, INC., : 82 Civ. 8697
Plaintiffs, : (RWS)

- against -

THE MARVEL ENTERTAINMENT :
GROUP, a division of CADENCE :
INDUSTRIES CORPORATION, :
JAMES GALTON, AL BRODAX, :
MICHAEL S. KLEIN, LUIS :
QUIROS, DUMLER & GIROUX, :
THE SHUKAT COMPANY, LTD., :
SCOTT SHUKAT, PETER S. :
SHUKAT, ESQ., and where neces- :
sary, LMN PRODUCTIONS, INC., :
Defendants. :
_____ X

AFFIDAVIT

THE MARVEL ENTERTAINMENT :
GROUP, a division of CADENCE :
INDUSTRIES CORPORATION, :
JAMES GALTON, AL BRODAX, :
LMN PRODUCTIONS, INC., MIC- :
HAEL KLEIN and LUIS QUIROS, :
Third-Party Plaintiffs, :
_____ X

- against -

DUMLER & GIROUX, THE :
SHUKAT COMPANY, LTD., :
SCOTT SHUKAT and PETER S. :
SHUKAT, ESQ., :
Third-Party Defendants. :
_____ X

STATE OF NEW YORK)
) SS.:
 COUNTY OF NEW YORK)

ROBERT B. McKAY, being duly sworn, deposes and says:

1. Deponent is a member of the firm of Santora & McKay, attorneys for defendant Al Brodax in the above captioned action.

2. Deponent has personally been involved in this matter since shortly after its inception in December of 1982.

3. This affidavit is submitted in support of a motion pursuant to the inherent power of this Court and pursuant to Fed.R.Civ.P. 11, 17 U.S.C. §505 and 28 U.S.C. §1927, seeking an award to defendant Al Brodax of attorneys', fees, costs and expenses incurred in the defense of this action, as against the plaintiff, and as against Ray LeFlore and Pavelic & LeFlore, the attorneys for the plaintiff. To the extent applicable, Brodax also relies upon and incorporates by reference the other papers being submitted by the other defendants on similar motions.

4. If there were ever a case in which it is appropriate to award attorneys' fees, costs and expenses, this is it. This motion comes as no surprise to Mr. LeFlore or to the Court. Defendants' counsel have repeatedly warned Mr. LeFlore that this motion would be brought, because of the institution, prosecution and trial of a meritless lawsuit. The Court has also warned Mr. LeFlore on several occasions, explicitly doing so in its decision of July 3, 1984.

The Standards Applicable To This Motion

5. As seen in the accompanying memorandum of law, the standards set forth in the above mentioned legislation, and in case law decided thereunder, are amply met by the facts and circumstances of the instant case. In addition, aside from this legislative authority, this Court has the inherent power, under established case law, to award attorneys fees under the proper circumstances, as here. For the sake of convenience, the pertinent provisions of the aforementioned legislation is set forth below. Rule 11 provides in pertinent part as follows:

... The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other papers; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well founded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is signed in violation of this rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. (As amended April 28, 1983, effective August 1, 1983.)

17 U.S.C. §505 provides in pertinent part as follows:

In any civil action under this title, the Court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as provided by this title, the

Court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

28 U.S.C. §1927 provides in pertinent part as follows:

Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

6. This case should never have been brought in the first place. It should have been dismissed in response to various motions filed by the defendants, but survived those motions because of false, misleading or baseless assertions made in affidavits, memoranda of law, and other papers submitted by and on behalf of the plaintiff. It should have been voluntarily discontinued by the plaintiff at any of several different stages of the litigation, because it was completely lacking in merit both on the facts and the law. Finally, the defendants should never have been required to endure a six-week trial of an action so completely lacking in merit. Because Mr. LeFlore and his law firm knew or should have known of the absence of any merit to this case, he and his firm should be held responsible for defendants' attorneys' fees, costs and expenses.*

*Because of the almost certain conflict of interest created between Calloway and his present attorneys, by virtue of this and other defendants' motions, it would appear necessary for Calloway to obtain separate counsel for purposes of this motion. At the very least, a complete set of all papers served in connection with the various motions should be separately provided to Calloway. In addition, because malpractice insurance coverage may be applicable here, appropriate notice should be given by Calloway's attorneys to their insurers.

7. While the trial of this action is the freshest in everyone's memory, lasting as it did for six weeks and revealing the stark lack of merit of plaintiff's claims, both on liability and damages, the three and a half years of litigation that preceded this trial must not be forgotten.

The Unfounded Assertions In The Pleadings

8. Although the only claims ultimately tried were those of copyright infringement and various counts of fraud, there were numerous other meritless claims previously asserted by the plaintiff which were either dismissed by the Court or were dropped by the plaintiff just before or during the trial itself (*see, e.g.*, Tr. 86-87, 2346-47): claims of civil conspiracy, damage to Calloway's business reputation, violation of his right of privacy, defamation, and punitive damages for copyright infringement.

9. After the dismissal on June 30, 1983 of the original complaint, which was signed by Mr. LeFlore, an amended complaint dated July 29, 1983, also signed by Mr. LeFlore, was filed. This asserted nine causes of action, five of which were asserted against defendant Brodax. The first cause of action against him sought damages of \$11 million for copyright infringement. The second cause of action against him sought damages of \$3 million, plus punitive damages in an unspecified amount, for defamation and violation of Calloway's right of privacy. The third cause of action against him sought damages of \$11 million, and included in paragraphs 51 and 56 the assertion that the June 8, 1981 agreements were falsified "at Marvel's behest". Since Marvel only acted

through Brodax and Galton in connection with this matter, they were obviously included as targets of this allegation. The fourth cause of action against Brodax sought treble damages in the sum of \$33 million on the basis of the allegation in paragraph 70 that his conduct was "knowing, willful and malicious". The seventh cause of action against him sought \$5 million for tortious interference, and included an allegation in paragraph 77 that LMN had obtained a \$5 million "commitment to fund" the Skyrider project.

10. In addition to the foregoing allegations which had absolutely no basis in fact, the amended complaint also included a series of allegations which were either false or with no factual or legal foundation, the more blatant of which are as follows:

a) ¶16 - that Calloway had *written* five pilot scripts for television, musicals for Broadway production, screenplays and two record albums. As admitted by Calloway at the trial, he had never written anything (Tr. 834, 865-66).

b) ¶24 - that in March and April of 1981 Calloway displayed and delivered to Marvel (*i.e.* Galton and Brodax) copies of his works on the Skyrider. As established at the trial, Calloway did not present any written material to Marvel in March and April 1981, nor at any other time (Tr. 596-97, 3726).

c) ¶27 - that Galton and Brodax embarked upon a scheme and course of conduct designed to misappropriate and use Skyrider for their own purposes. There was absolutely no basis for this allegation and no evidence suggesting this was presented at the trial.

d) ¶28 - that Sy Rider was "copied in large part from plaintiff's copyrighted works". While this was a

core allegation for plaintiff's claims of copyright infringement, the evidence presented at the trial made it abundantly clear that there was no basis in fact for this allegation. The so-called Marvel presentation contained but a single phrase that appears in the copyrighted script, namely, a description of Assegai as "an excitable, strange-eyed platinum-haired black man". Even this line had not been written by Calloway, but by David Steven Roth. Ironically, in ¶29 of the amended complaint, Calloway had asserted that Brodax had created this line, and that this was one of the objectionable items that he complained about in Sy Rider.

e) ¶32 - that Galton and Brodax had caused their "unlawful work" "to be distributed throughout the entertainment industry and in the financial community involved with such projects" since April 12, 1982. There was absolutely no basis for this allegation, and no such evidence was presented at the trial.

f) ¶36 - that Brodax's acts were done "maliciously". Not only was there no basis for this allegation, but, as demonstrated at the trial, any activity by him in connection with the Skyrider project was done pursuant to the permission of LMN, which had the authority to license such activity.

g) ¶35 - that Sy Rider has prevented Skyrider from being sold or marketed. Absolutely no such evidence was presented at the trial to sustain this baseless allegation.

Other Unfounded Assertions

11. The accusations of misconduct hurled at Brodax and the other defendants were not limited to the allegations in the complaint and amended complaint. In various other papers filed by Mr. Calloway and Mr. LeFlore since the beginning of this lawsuit, there were a series of other baseless allegations and misstatements of fact and

law which have hung over the defendants for three and a half years. The more blatant of these are as follows:

a) In a Rule 3-g Statement dated April 4, 1983, signed by Mr. LeFlore, he asserted:

1. ¶12 - that plaintiff believes that the management agreements with SCL were fraudulently altered. No attempt was even made to prove this at the trial.

2. ¶22 - that "Shukat was solicited directly by Galton and Brodax, on Marvel's behalf, to extend the option to LMN . . ." There was no basis for this allegation.

3. ¶34 - that "Shukat never held Calloway's power of attorney, nor was he ever authorized to sign as attorney-in-fact on Calloway's behalf". Scott Shukat clearly held a power of attorney (Ex. AE, 43).

b) In a memorandum of law dated April 4, 1983, signed by Mr. LeFlore, he asserted:

1. Page 4 - that the synopsis and outline were "derived from" the copyrighted screen-play. The evidence clearly shows that just the opposite is true.

2. Page 42 - that plaintiff will show that the management agreements were falsified. He made no such showing.

3. Page 61 - that "we do not lightly accuse defendants of such misconduct at this stage of the case . . ." The absence of any basis for the many accusations of misconduct speaks for itself.

c) Although the amendment to Rule 11 came into effect on August 1, 1983, and the amended complaint was dated July 29, 1983, the allegations in the amended complaint were restated and carried forward by Mr. LeFlore on numerous occasions. One

example appears in a memorandum of law filed in October of 1983 and signed by Mr. LeFlore, some fifty-five pages in length, in which he reconfirms the allegations in the amended complaint in minute detail. Another example appears in another 3-g Statement filed by Mr. LeFlore, which is dated April 2, 1984, and is annexed to Mr. Calloway's affidavit of the same date.

d) In Mr. Calloway's affidavit of April 2, 1984, the following unfounded assertions appear:

1. ¶7 - that Calloway neither signed nor approved the June 8, 1981 agreements and that they "were forged and contrived to deceive".

2. ¶8, p.4., fn. - Calloway admitted that the shareholders agreement "merely defined the shareholders' relationship *inter se*". This admission puts the lie to the elaborate contrary arguments presented at the trial by Mr. LeFlore on the basis of the shareholders agreement.

3. ¶30 - that Calloway never signed an option agreement in his individual capacity, but only on behalf of Netta Productions Inc.

4. ¶34 - that Sy Rider was based in large part upon his script.

e) Plaintiff's 3-g Statement of April 2, 1984, signed by Mr. LeFlore, included the following unfounded assertions:

1. Pages 7-8 - that Marvel, Galton and Brodax continued to display Sy Rider after January of 1982. This, of course, was a baseless assertion (Tr. 3161, 3744-45).

2. Page 8 at the bottom - that plaintiff contends that the synopsis and outline "are subsumed in the copyright registration of the script". This assertion is directly contrary to the law, as expressed in 17 U.S.C. §103.

3. Pages 14-20 - that Calloway denies that he executed the option agreement.

4. Page 21 - that Calloway contends that the front money people were intermediaries for Marvel, and that Marvel really paid the front money. There was and is absolutely no basis for this unfounded assertion.

f) In plaintiff's memorandum of law dated April 2, 1984, filed in opposition to motions for summary judgment by the defendants, and signed by Mr. LeFlore, the following assertions appear:

1. Page 2 - that Marvel, Galton and Brodax unlawfully induced, and conspired with, others to cause to be drafted and forged a series of documents purporting to authorize defendants' infringements of plaintiff's copyright.

There was and is absolutely no basis for this unfounded allegation.

2. Page 6 - LeFlore states here that

the only basis on which defendants could hope to obtain summary judgment in their favor is their claim that plaintiff signed or approved the agreements on which they purport to rely.

Plaintiff's affidavit, sworn to April 2, 1984, unequivocally attests that he neither signed nor approved the agreements on which defendants purport to rely.

* * *

There could be no clearer statement that defendants have nothing authentic on which to rely.

Mr. LeFlore thus recognized that his only way of prolonging this lawsuit was to assert that the June 8, 1981 agreements were not genuine.

g) In plaintiff's reply memorandum of law dated May 3, 1984, signed by Mr. LeFlore, the following statements were made:

1. Page 5 -

... plaintiff has unequivocally affirmed that the documents on which defendants purport to rely were forged without plaintiff's knowledge or consent.

2. Page 6 -

Once it is shown, as it already has been, that plaintiff did not sign or approve any such document, defendants' only recourse is to claim-over against those individuals who either forged plaintiff's signature or represented they were authorized to sign for him.

Mr. LeFlore again admits that his only way to keep this lawsuit going was to assert that the agreements were forged. He also admits that these unfounded assertions required the cross-claims and third-party claims that were asserted by defendants against the Shukats. It was thus Mr. LeFlore who drew all of the defendants and third-party defendants into the entangled web of this lawsuit. At the oral argument of the summary judgment motions on May 4, 1984, Mr. LeFlore repeated in open court his assertion that the June 8, 1981 agreements were forged.

12. This Court's decision of July 3, 1984 made it clear that the defendants' motions for summary judgment were being denied on the basis of the assertions made in Mr. LeFlore's opposing papers:

Calloway does not dispute defendants' contentions that the terms of the Option Agreement would authorize defendants' acts, but states by affidavit that he never signed or approved the Option Agreement and that Peter Shukat, without Calloway's knowledge,

affixed a facsimile of Calloway's signature to the agreement.

Calloway has by a narrow margin put sufficient facts in contention to withstand defendants' summary judgment motion.

(Opinion of July 3, 1984, p. 2). The Court made it a point to warn the plaintiff and his counsel that they were risking the imposition of attorneys' fees under Rule 11 and 17 U.S.C. §505, and further that:

The Court will not hesitate to award such costs if the facts are found after trial to warrant such an award.

It is respectfully submitted that the facts after trial clearly warrant the imposition of costs and attorneys' fees against plaintiff and his counsel.*

13. In an affidavit sworn to by Mr. LeFlore on August 9, 1984, he asserted in paragraph 3 that:

... many of the documents concerned are originals which, we believe, will demonstrate conclusively that plaintiff did not sign the agreements on which defendants purport to rely in this action.

Demonstrative of the facile way in which Mr. LeFlore played fast and loose with the Court and the defendants is an excerpt from the plaintiff's Answers and Objections to Peter Shukat's Interrogatories, signed by Mr. LeFlore on April 22, 1985, which stated, incredibly, on page 4:

*Because Mr. Levites' role in this case commenced only shortly before trial, deponent does not believe that the imposition of costs, attorneys' fees or expenses should extend to him individually.

Plaintiff has never alleged any forgery of plaintiff's signature, nor is it alleged that any defendant, or defendants, fraudulently altered any document bearing any reasonable relationship to any document plaintiff ever executed on his own behalf or on behalf of Netta Productions Inc.

14. By the summer of 1984, three rounds of motions had been made by all of the defendants to dismiss the complaint and amended complaint, and/or obtain summary judgment, and, as reflected in this Court's Opinion of July 3, 1984, plaintiff's case was hanging by the thin thread of the assertion that the June 8, 1981 agreements were forged and contrived.

The Copyright Infringement Claim

15. In order for Mr. Calloway's claim of copyright infringement to prevail, it was necessary to prove access to the allegedly infringed work, and substantial similarity between that and the supposed infringing work. Even assuming proof of those elements, the claim would fail if it were established that the June 8, 1981 agreements were genuine, since they provided a license to engage in activity in connection with *The Skyrider*.

16. As set forth above, Calloway and LeFlore repeatedly made assertions in their papers to the effect that the so-called Marvel presentation was copied from the copyrighted work (the screenplay); that it was repeatedly displayed by Brodax, Galton and Marvel to the general public; that the license granted by the June 8, 1981 agreements was invalid, because the agreements themselves were not genuine, since they "were forged

and contrived to deceive"; that all the defendants conspired in forging these agreements; and that they acted maliciously. There was simply no basis in fact or in law for LeFlore and Calloway to make these unfounded allegations, not just once, but repeatedly over the course of three and a half years.

17. Putting aside the question of access, as to which there was considerable doubt with respect to Brodax, Galton and Marvel, there was never any basis for the claim of substantial similarity. Here, the alleged infringed work was the screenplay which was filed with the Copyright Office in July of 1982 (Ex. 329). The alleged infringing work, the so-called Marvel presentation (Ex. 325), can in no way be said to have been substantially similar to the screenplay. Indeed, the only similarity which there was was the phrase previously noted, namely, a description of Assegai as "an excitable, strange-eyed, platinum-haired black man". No attempt was made to prove similarity beyond this single phrase. As a matter of law, this could not possibly be copyright infringement. Nevertheless, despite the absence of any facts to support this unfounded claim, Calloway had alleged in paragraph 31 of his original complaint that Sy Rider "was copied in large part from plaintiff's copyrighted works". He then repeated the same allegation in paragraph 28 of the amended complaint. Both of these pleadings were signed by Mr. LeFlore.

18. In paragraph 34 of Mr. Calloway's affidavit of April 2, 1984, he again asserted that Sy Rider was "based in large part" upon his script. In section III (a) of plaintiff's pre-trial order, also signed by Mr. LeFlore, he asserted on page 7 in paragraph P that Sy Rider was

"copied in large part from plaintiff's copyrighted works". He repeated this assertion on page 13 under plaintiff's contentions in section III (b). Plaintiff's claim for copyright infringement was carried forward for three and a half years by plaintiff and his counsel without any legal or factual basis.

19. Even if Calloway and LeFlore had a proper basis on which to assert a claim for copyright infringement, which they did not, they had no proper basis on which to assert that the June 8, 1981 agreements were not genuine, an assertion which they relentlessly made in an effort to defeat the defense of license under those agreements. Of great significance in this respect is the information that emerged at the trial of Mr. LeFlore's dealings with his handwriting expert.

Mr. LeFlore's Handwriting Expert

20. Although the case had begun in December of 1982, Mr. LeFlore did not see fit to retain a handwriting expert until November 1984 to attempt to substantiate his position with respect to the June 8, 1981 agreements, after he had already submitted numerous memoranda and affidavits to the Court repeatedly making a series of unfounded assertions.

21. Defendants found out for the first time during the trial of this action that LeFlore learned from his own handwriting expert in November of 1984 that his position was untenable (Tr. 385-86, 1766-67). Pre-trial efforts by defendants' counsel to learn the identity of Mr. LeFlore's handwriting expert and the conclusions reached by that expert were totally obfuscated by Mr. LeFlore's tactics, which now take on all the earmarks of a cover up.

a) In Calloway's answers and objections to interrogatories served on behalf of Peter Shukat, which were signed by Mr. LeFlore and dated April 22, 1985, Mr. LeFlore refused to identify his handwriting expert on the ground that it was "premature".

b) In an affidavit sworn to by Mr. LeFlore on May 20, 1985, he asserted in paragraph 3 thereof that "... no expert witness has yet been retained by plaintiff for purposes of trial. . . ."

c) Eight days later, in a document entitled "Plaintiff's Response to Order to Show Cause of May 22, 1985", which was signed by Mr. LeFlore and dated May 28, 1985, Mr. LeFlore stated that the original documents under Court seal

confirmed the fraudulent alteration and/or creation of fictitious documents purporting to "authorize" certain rights in respect of the subject matter of this action, to wit "The Skyrider".

d) Less than a week later, in Calloway's answers to Peter Shukat's supplemental interrogatories, signed by Mr. LeFlore and sworn to by Mr. Calloway on June 3, 1985, they stated on page 4 that the original documents under Court seal

evidence the affixation of a facsimile of plaintiff's signature thereto, and evidence defendants' fraudulent intent in respect thereto.

e) In the answers to interrogatories served by Mr. Quiros, signed by Mr. LeFlore and sworn to by Mr. Calloway on June 3, 1985, they finally identify Pearl Tytell as an expert they have retained (page 7, #2), yet they repeat the assertion on page 10 in response to interrogatory 4(b) that the original documents under Court seal

evidence the affixation of a facsimile of plaintiff's signature thereto, and evidence defendants' fraudulent intent in respect thereto.

They also assert in answer to interrogatory 4(e) on page 10 that "plaintiff did not sign such documents".

f) In their answers to interrogatories served on behalf of Marvel and Galton, signed by Mr. LeFlore and sworn to by Mr. Calloway on June 3, 1985, they again identify Pearl Tytell as an expert they have retained, but in paragraph (g) they assert that no reports have yet been rendered by Mrs. Tytell. Although Mrs. Tytell testified at the trial that she had not rendered any written reports as of November 1984, she testified that she had orally reported to Mr. LeFlore that there was no basis for the claim that Mr. Calloway's signatures had been forged (Tr. 1634, 1703-04). Thus, this interrogatory answer was deceptive, if not false. Mrs. Tytell admitted that she never examined a document which purported to contain Calloway's signature which did not contain his signature (Tr. 1697).

g) This deception is more blatantly illustrated in plaintiff's supplemental answers to Peter Shukat's supplemental interrogatories, signed by Mr. LeFlore and sworn to by Mr. Calloway on September 23, 1985. Interrogatory number 7 had specifically asked whether any expert had been consulted who had opined that the signatures were facsimiles and were not plaintiff's genuine and authentic signatures. Instead of answering this question, Mr. LeFlore merely referred to the answers given to Marvel's interrogatories, as set forth in subparagraph (f) above.

21 A. At the trial, portions of Mr. Calloway's deposition were read into the record, in which he had earlier testified in unequivocal terms that his signatures on the June 8, 1981 agreements were forged. *See, for example*, Tr. 720-23, where Mr. Calloway's deposition testimony stated: "That signature I can state with absolute certainty is not mine." Of course, at the trial, Mr. Calloway was

forced to admit that his signatures *did* appear on the June 8, 1981 agreements (Tr. 1553). The Court went so far as to state, after learning of Pearl Tytell's conclusions in November 1984, as expressed then to Mr. LeFlore:

There will be no question but that the signatures are genuine. . . . It may well be that sanctions will be appropriate. It may well be that costs will be appropriate.

Tr. 386-87. Their tactic at the trial shifted from the prior three and a half years of denying that Mr. Calloway's signature was on the documents* to some nonsense that he had signed the agreements under the misimpression that Netta was a party to them (Tr. 2374-75, 3503-04, 3583). Calloway had been advised by his accountant, his manager and his lawyer that the use of Netta would be of no benefit to him (Tr. 3333-34), and the decision was made not to use Netta (Tr. 3336). A case that should have been dismissed on summary judgment grounds continued for three and a half years on the basis of false statements and/or deceptive tactics by plaintiff and his counsel.

22. Not only did Mr. LeFlore conceal, throughout pre-trial discovery, the conclusions reached by Mrs. Tytell in November 1984,** which should have ended the case

*In 1983 Mr. LeFlore had interviewed Calloway's prior best friend, Gavin Spencer, and had suggested to him that documents had been forged (Tr. 2460). Mr. Spencer, of course, was not influenced by Mr. LeFlore's suggestion, and believed that they contained Calloway's signatures (Tr. 2515).

**According to Calloway, Mr. LeFlore may have concealed Mrs. Tytell's conclusions from his own client (Tr. 1307-08). Cf. Tr. 1337.

then and there, but he even withheld essential information from his own handwriting expert, retained not before the case was commenced in December 1982, but two years later in November 1984. In an apparent effort to manufacture some nonsense claim about the genuineness of the June 8, 1981 agreements, he had her examine only the final signed agreements, focusing on white-out and the word "By". What he kept from her were the drafts that led up to the final agreements, and the correspondence from June to August 1981 (Tr. 1665-66, 1669, 1690) which tell the whole story, and would have made it plain, even to Mrs. Tytell, that there was nothing sinister about the white-out or the word "By".* Was this information intentionally withheld from Mrs. Tytell by Mr. LeFlore, or was he negligent or incompetent? For purposes of this motion, it doesn't matter. He should have provided this information to her, and he did not.

23. Mr. LeFlore was so zealous in trying to establish that the June 8, 1981 agreements were not genuine, of course, because their genuineness would provide a complete defense to his baseless copyright infringement claim. What made his position even more absurd is that the key clause in the Writers Agreement, containing the "add to, subtract from" language, appeared in the very first draft of that agreement (Ex. AC, ¶3), and was carried through each draft virtually unchanged (Ex. AB, AA, Z,

*The drafts and correspondence relating to them were painstakingly reviewed at the trial with Mr. Calloway, Mrs. Tytell and Mr. Dumler, and readily remove the mystery, if there ever was one, of the format of the final signed agreements (see, Tr. 877-82, 900-23, 1650-90, 2624-36, 2647-53, 2848-63).

Y, X and W), into the final signed agreement (Ex. V). Calloway himself admitted at the trial that this language was in the agreement that he signed (Tr. 833), and that the effect of the agreements that he signed was to cede *The Sky rider* rights to LMN (Tr. 960). It was also undisputed at the trial that LMN had authorized Marvel to prepare the presentation (Tr. 872, 1547, 3159, 3290, 3739-44).

The Absence of Damages

24. Another factor indicating the total absence of merit to plaintiff's claims is the matter of damages, or the lack thereof. When this action was commenced in December 1982, the complaint, signed by Mr. LeFlore, sought treble damages of \$33 million for copyright infringement. The amended complaint, also signed by Mr. LeFlore, sought the identical relief. Section VI of plaintiff's pre-trial order, also signed by Mr. LeFlore in April of 1984, sought the same relief at page 20. Mr. Calloway's deposition and trial testimony could not substantiate any damages (Tr. 862-64, 3859-61, 3869-71). Was there any basis on which to make such an outlandish claim? Was there even an expert willing to prostitute himself to opine on such damages? We learned only in the middle of the trial that Mr. LeFlore had not even consulted an expert on damages until a few weeks before the trial had begun (Tr. 430, 2122), a fact which distressed the Court itself (Tr. 2122). Thus, a case had proceeded for three and a half years seeking an aggregate amount of damages of \$68 million, on the basis of nothing. It is doubtful whether anyone would be able to give any credible testimony to support such a claim for damages. The expert ultimately retained by Mr. LeFlore, Mr. William Smith, was not qualified to

testify as to anything beyond merchandising rights. Even Mr. Smith's testimony, as limited as it was, was based totally on speculation (Tr. 2167-75),* and was even based on the incorrect assumption that Disney would have produced the picture (Tr. 2210, 2213-14, 2227-28). The testimony of Galton and Brodax was to the effect that no one can give a credible estimate of what profits or gross revenues can be derived from a motion picture or merchandising (Tr. 3135-36, 3721-22), particularly one written by someone who had never written a screenplay before, and a picture that had yet not been made, nor was financing able to be raised for it. Not only were no damages proved, but there was no proof of any causal relationship between any alleged wrongful acts of the defendants and any alleged harm caused to Calloway.

The Special Verdict Form

25. Putting aside the unfounded claims that were dismissed by the Court before the trial (*see, e.g.*, this Court's opinion of December 22, 1983) and those which were dropped by the plaintiff before or during the trial (Tr. 86-87, 2346-47), and focusing only on those claims that were actually submitted to the jury via the special verdict form, it is clear that this case should never have been instituted, should have been dropped before trial, and should never have been tried by the plaintiff or his attorney. Mr. LeFlore knew, or after reasonable inquiry should have known, that there was no basis to plaintiff's

*As with Mrs. Tytell, Mr. Smith was similarly provided with misinformation by Mr. LeFlore. *See*, deposition of Mr. Smith.

claims, and accordingly he and his firm should be held responsible for the attorneys' fees, costs and expenses incurred by or on behalf of the defendants.

26. With respect to question number 3 on the special verdict form, whether Calloway instructed Scott Shukat not to extend the period of the option, the only evidence to support that assertion was Mr. Calloway's testimony. All of the other evidence, both direct and circumstantial, was to the contrary. The direct evidence included the testimony of Scott and Peter Shukat, as well as Gavin Spencer and Russell Frascella (Tr. 3305-06, 3473-74, 2441). In addition, the management agreement itself gave Scott Shukat (SCL) the authority to sign on Calloway's behalf (Ex. AE, 43; Tr. 3324-26). Calloway himself admitted that on prior deals, Scott Shukat had signed Calloway's name on his behalf (Tr. 867-68, 931). Calloway also testified that from September 1981 until January 1982 he had taken a leave of absence from *The Skyriders* project because of his heavy involvement with the Broadway production *Louie*, the taping of Sesame Street and other matters (Tr. 869-70). Thus, it was perfectly sensible that Calloway was too busy at the time to bother with signing various documents which he asked Scott to sign on his behalf in September 1981. In addition, the sense of the situation made clear that Calloway's testimony was simply not credible. He had been attempting to raise money for this project for two years, unsuccessfully (Tr. 845-46, 3330-32), and this was his first opportunity to obtain the largest single payment in his life for his work (Tr. 870-71, 981). There was no one waiting in the wings to put up any other money (Tr. 842, 845-46, 3305-06), and it simply did

not make sense for him to have instructed Scott Shukat to end the deal.

27. With respect to question number 6 on the special verdict form, the June 8, 1981 agreements clearly provided that LMN had the right to make alterations, additions etc. As noted by the Court in its July 3, 1984 opinion, Calloway (*i.e.*, LeFlore) did not even dispute that point at that time. The contrary argument was an afterthought concocted by Mr. LeFlore, which was in direct contradiction to the express terms of the agreements. Moreover, there was no proof of any copyright infringement in any event. The main writing utilized in the so-called Marvel presentation was the David Steven Roth synopsis, which was never copyrighted (Tr. 836). The balance was independently created by Brodax, and contained but a single descriptive phrase from the copyrighted screenplay, and was in no way substantially similar so as to constitute copyright infringement. Remarkably, Calloway admitted that he had never compared the Marvel presentation to any other *Skyriders* writing (Tr. 848). To the extent that Calloway himself may have relied on opinions expressed by Peter and Scott in June of 1982 in believing that his rights had somehow been violated, Mr. LeFlore clearly had an obligation to make his independent determination as to whether or not there was any infringement. As demonstrated at the trial, the opinions expressed by Peter and Scott in June 1982 were based upon misinformation provided to them by Mr. Calloway (Tr. 3581-82), were expressed only at Calloway's "adamant insistence" (Tr. 1546), and were contrary to Mr. Dumler's view at the time (Tr. 3580). All of the

evidence demonstrates that there simply was no infringement, which would require a negative answer to question number 7, had it been reached.

28. Although the issue of fair use was not reached in question number 8, it is clear that even if there had been an infringement, the doctrine of fair use (17 U.S.C. §107) would have exempted Brodax from any liability.

29. Question number 10 dealt with the issue of damages, a question which was not reached by the jury. As previously noted, the only "evidence" to support damages was Mr. Smith's testimony. There was not a shred of other evidence to support any of plaintiff's outlandish claims for damages. Mr. Smith's testimony on this question was virtually worthless, based as it was on pure speculation (Tr. 2167-75).

30. Question number 11 dealt with a factual contention made on Calloway's behalf for the first time on the eve of trial. As with question number 3, the sole "evidence" to support this contention was Calloway's own inherently inconsistent and incredible testimony. All the other evidence was to the contrary (see e.g., Tr. 3503-04, 3583). It is of no small significance that Calloway was repeatedly confronted at the trial with material inconsistencies between his then testimony and his deposition testimony, while, to deponent's recollection, there was not a single material discrepancy between the trial testimony of any defense witness and his deposition testimony.

31. Question number 12 was, to borrow from Mr. LeFlore's summation, a complete red herring issue. Once again, Calloway's incredible and inconsistent testimony

was the only "evidence" to support his contention, while all the other evidence was to the contrary. The terms of the so-called "escrow" arrangement were spelled out in letters (Ex. CB, CG). Moreover, it was Mr. Dumler, and not Peter Shukat, who released the documents (Tr. 3481-85). Dumler had previously been dismissed from the action pursuant to this Court's opinions of December 22, 1983 and January 29, 1985. Finally, whether or not there was a violation of an escrow arrangement in February [sic] 1982, or even a misrepresentation in connection with it (which there was not) was completely immaterial. Nothing happened after February 1982 that in any way adversely affected Calloway as a result of the escrow arrangement. The trip to London had already taken place in January (Tr. 3160). The only activity in the *Skyrider* project thereafter was the efforts of Klein and Quiros to raise financing (Tr. 933), while Mr. Calloway sat idle (Tr. 844, 973). Thus, there could have been no damages awardable under questions 13 and 14 of the Special Verdict Form.

32. With regard to question 15, whether Scott misrepresented a material fact to Calloway in connection with the September 1981 Agreement, the prior comments with respect to question 3 in paragraph 26 *supra* are equally applicable here. The evidence is to the contrary (Tr. 3305-06, 3309, 3473-74). Moreover, the contention by Calloway that he was told that the front money had already been paid in early September 1981 is absurd on its face. Calloway himself was admittedly in possession of the LMN checkbook at that point in time (Tr. 871, 3235), and thus had first hand information on the status

of the LMN bank account. Finally, there was no provable damages in connection with questions 16 and 17.

33. On each of the issues presented at the trial, there was either no evidence whatsoever to support Mr. Calloway's unfounded assertions, or the only evidence was Mr. Calloway's usually incredible and inconsistent testimony. All of the other documentary and testimonial evidence was contrary to Mr. Calloway's unfounded allegations.

34. Although the principal concern of Brodax at the trial was the defense of the \$33 million claim for copyright infringement, he also had an interest in defeating the other outlandish allegations made by Calloway. This is so because the genuineness of the June 8, 1981 agreements and the proper exercise of the LMN option might have affected a principal defense to the copyright infringement claim, namely, that Brodax, Galton and Marvel were properly authorized by LMN to engage in activity with respect to the Sky rider project. Moreover, Brodax had earlier been accused by Calloway and Mr. LeFlore of having engaged in improper activities in connection with the June 8, 1981 agreements and the extension of the option period (see, ¶¶9-11 *supra*), assertions which were never retracted by them. Thus, in a very real sense, the bulk of the other issues in the case were all intertwined with the claim for copyright infringement.

35. Not only was there no basis in fact or in law for the claims and assertions made by Calloway and LeFlore, but other attorneys had expressed a similar view even before the lawsuit was commenced (Tr. 3574-75, 3648). Mr. LeFlore included allegations of forgery and other

misconduct against Peter Shukat, Mr. Calloway's attorney of ten years, without ever asking him beforehand if there were any truth to the allegations (Tr. 3646). Mr. LeFlore's only conversation with Peter Shukat prior to the trial contained a baseless threat of disbarment, on the absurd ground that Peter Shukat was refusing to turn over files on the basis of an attorney's lien (Tr. 3490).

The Pre-Trial Discovery

36. Because the net cast by Mr. Calloway and Mr. LeFlore encompassed so many people, and because their version of the facts and theory of the case kept shifting as the lie was put to prior versions, the discovery aspect of this case prior to the trial was unnecessarily protracted. Yet it was protracted for yet another reason, and that was Mr. LeFlore's incredible capacity to delay, obfuscate, deceive, and protract proceedings.* Mr. Calloway's deposition lasted as long as it did because: a) his story kept changing, b) it was constantly interrupted by Mr. LeFlore for no proper reason, c) Mr. Calloway and Mr. LeFlore sued a multiplicity of defendants, entitling each of their lawyers to depose Mr. Calloway, d) defendants' several motions to dismiss and/or for summary judgment had previously been denied on the basis of serious assertions of misconduct put forth by Calloway and LeFlore. As to the other witnesses, it was Mr. LeFlore who noticed and took the depositions of Brodax, Galton, Peter Shukat, Scott Shukat, Larry Weiss, Michael Klein, Luis Quiros,

*One example has already been mentioned in ¶¶20-22 above, relating to Mrs. Tytell.

Egon Dumler, Paul Osborn and Dr. Rohrs. The fact that none of these parties or witnesses supported Mr. Calloway's baseless claims did not deter Mr. LeFlore from pressing forward with the lawsuit and concluding it with a six-week trial and 4433 pages of trial transcript. Mr. LeFlore chose not to attend the depositions of Spencer, Roth, Frascella and Lagronegro, whose testimony also put the lie to Calloway's claims. More than 40 days of depositions of at least 18 witnesses were taken in this case.

37. It is simply outrageous that a lawsuit was begun and continued for three and a half years, culminating in a six-week jury trial, seeking damages of \$33 million for copyright infringement, when the only similarity between the alleged infringing work and the alleged infringed work is a single phrase describing a minor character; when a complete defense to this claim existed because the alleged infringers were operating pursuant to the authority granted to the corporate entity (LMN) holding the rights to the *Skyrider* project; when the authorization or license to engage in activity with respect to the *Skyrider* project is clearly set forth in written agreements which were genuine and were signed by the plaintiff himself, despite the earlier testimony and contentions by both the plaintiff and his counsel that the agreements were forged and falsified; and when there were no provable damages, despite an aggregate claim of \$68 million. One would be hard pressed to find a more fitting example of a case in which costs and attorneys' fees should be imposed upon both the plaintiff and his counsel pursuant to the inherent powers of this Court and Rule 11, 17 U.S.C. §505 and 28 U.S.C. §1927.

The Opportunity For Settlement

38. The only formal settlement demand made by Mr. LeFlore during the course of this action was at a pre-trial conference before this Court on July 10, 1985. Despite the absence of any merit to his claims, whether on liability or damages, Mr. LeFlore brazenly made a settlement demand of \$6 million at that time.

39. Prior to the commencement of the trial, the plaintiff and Mr. LeFlore were given an opportunity to gracefully withdraw the meritless claims that had been asserted when offers of judgment were made by most if not all of the defendants. None of these offers was accepted, causing the consumption of six weeks of the Court's valuable time, along with that of ten jurors, defense counsel and the seventeen witnesses that testified at the trial.

The Attorneys' Fees, Costs and Expenses of Brodax

40. Mr. LeFlore, and his law firm, because of a contingent fee arrangement, were not going to be compensated for their services unless plaintiff achieved a monetary recovery in this lawsuit. That does not excuse their conduct in continuing the prosecution of a case that they knew, or should have known, had no merit.

41. While the plaintiff was not obligated to pay the hourly charges of Mr. LeFlore and his law firm, because of their contingency arrangement, the defendants were on a far different footing. Since nothing was to be gained by them, except the dismissal of a meritless lawsuit, the defendants had to pay hourly charges to the various attorneys. Speaking only for defendant Brodax, the legal

fees and disbursements which have been billed and paid to date on his behalf total \$162,623.69. Deponent's billing rate was \$150 per hour for these fees, his customary billing rate. Annexed hereto as Exhibit 1 are copies of the bills that have been paid on behalf of Mr. Brodax to date, showing a total of \$150,207 in fees and \$12,416.69 in disbursements. In addition, there are unbilled fees in the amount of \$71,808.50 and unbilled disbursements in the amount of \$4,466.70 through May 31, 1986. In addition, there are and will be additional fees and disbursements incurred in connection with the instant motion and any further proceedings. Time sheets and computer printouts can be made available to the Court to further document the foregoing fees and disbursements.

WHEREFORE, for the reasons set forth above and in the accompanying memorandum of law, and in the papers submitted by the other defendants, it is respectfully requested that the Court grant to defendant Brodax against the plaintiff, and his counsel Ray LeFlore and Pavelic & Leflore, an award of the full amount of the attorneys' fees, costs and expenses incurred on behalf of said defendant throughout the course of this litigation, and granting him such other and further relief as this Court deems just and proper.

/s/ Robert B. McKay
ROBERT B. McKAY

Sworn to before me this
12th day of June, 1986.

/s/ Olga R. Hauck
Notary Public

BY HAND

June 27, 1986

Honorable Robert W. Sweet
United States District Judge
United States District Court
Southern District of New York
Room 410
Foley Square
New York, New York 10007

Re: *Calloway v. Marvel Entertainment Group, et al.* 82
Civ. 8697 (RWS)

Dear Judge Sweet:

At approximately 1:22 p.m. on June 26, 1986, the undersigned received plaintiff's Memorandum in Opposition to Defendants' Post-Trial Motions for Sanctions, Costs and Attorneys' Fees. In order not to delay hearing, argument and decision on the motions for sanctions, and based upon my belief that the essence of plaintiff's counsel's reply to Peter Shukat's argument can be easily culled and disposed of by the instant letter, I submit the following for your Honor's consideration.

Plaintiff's reply pertinent to Shukat is to be found on pp. 7 and 8 and the footnotes of those pages as well as p. 18. It appears from reading those portions of the Memorandum, that plaintiff's counsel seems to suggest that the basis for the claim against Peter Shukat of document tampering was that Calloway, in respect to the June 8, 1981 contracts, "had not . . . signed" the contracts "in the form in which they were received in evidence" and that further, Calloway "suggested" that one or more pages might have been removed, switched or otherwise manipulated

and that other changes had been made after he had signed." (Emphasis added).

In respect to this specific claim, Calloway and/or his counsel found further basis in the fact that the word "by" next to his signature was deleted from a page and that a small portion of his signature was whited out after he had signed one of the documents, as well as the fact that the representation page on the writer's agreement and music agreements made reference to Netta Productions, Inc.

Those contentions misrepresent what plaintiff stated his position to be prior to trial. Those contentions against Shukat concerning document tampering were specifically expressed in paragraph 52 of the July, 1983 amended complaint, and, as your Honor will recall, was not only asserted in those pleadings, but in plaintiff's proposed pre-trial order served on or about March 25, 1986 on p. 15 thereof, which reads as follows:

On or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat *improperly affixed a facsimile of plaintiff's signature* to a series of documents, back-dated to June 8, 1981, purporting to confirm by formal agreement the terms and conditions of a putative option for LMN to acquire "THE SKY-RIDER". (Emphasis added).

It is evident that plaintiff contended prior to trial that he did not sign the June 8, 1981 contracts and that those phony signatures were placed on the contracts by Peter Shukat. Your Honor's attention should also be addressed to pp. 47 through 50, of colloquy at a pre-trial conference, I believe on March 31, 1986, and the specific statement to your Honor by Mr. LeFlore, as follows:

The claim is that there are two pages of a document, the signatures of which were altered and they were slapped onto another document which the man never saw or signed.

There can be no dispute that the claim of "forgery" and document tampering against Peter Shukat kept him in the case and kept the case alive throughout discovery. As the term "facsimile" is used, there never was a facsimile because the signatures were original penned signatures. Not only were these signatures not mechanically impressed on the page but they were not traced or imitated by a person other than Calloway.

If it was plaintiff's counsel's intention to use the terminology "facsimile" as a substitute for document tampering and alteration of documents, then he was using purposely misleading terminology to avoid being pinned down on his claims. That was evident by his resistance to the directions of the Special Master and the Court about stating the substance of those particular claims and the substance of his expert's opinion.

Moreover, notwithstanding what is suggested in plaintiff's Memorandum, Calloway acknowledged in discovery and in the course of the trial, without any qualification, the genuineness of his signatures on the option or tie-in agreement(s). This fact certainly should have been considered by plaintiff's counsel, LeFlore, as it would have been considered by Pearl Tytell if she had been so informed, and, accordingly, there would not have been any remaining issue as to the genuineness of any of

the other Calloway signatures on the two (2) sets of the writer's agreement and the music agreement.*

Plaintiff's counsel makes reference to the removal, switching, and manipulation that "might have" occurred. There was no such verbal qualification in the charges against Peter Shukat, as a "might" or a suggestion; the pleadings said Peter Shukat, Esq. did it. The proof, on the other hand, showed that only two (2) of the eighteen (18) genuine Calloway signatures found on the two (2) sets of the June 8, 1981 contracts were partially whited out by less than a sixteenth of an inch in dimension, and touched up by "secretarial cosmetics", performed in Egon Dumler's, not in Peter Shukat's, office.

Nor was there any proof of switching or substitution of pages. Both handwriting experts testified that they could not quantify the number of staple holes. They both acknowledged that there was *no* proof to establish substitution of pages.

Paul Osborn, further, testified that, based on overall observation, it appeared that the number of staple holes on the different pages appeared to match and, therefore, he believed there was no substitution of pages. In fact, he agreed with Tytell's conclusions that the indentations or impressments of Calloway's and Klein's signatures, as well as some of the typewriting representing "secretarial

* Tytell testified these signatures on the Option Agreement would have been considered known writings along with the signatures on the checks supplied by LeFlore. Such known specimens in the "disputed documents" themselves would have eliminated all doubt for Tytell as to the genuineness of the signatures.

cosmetics" tended to prove that the pages of the documents were *together* when Calloway signed them.

These facts, plus the inconsistency of Calloway's testimony with the testimony of other witnesses and the documentary evidence that he signed the agreements in August 1981, rather than June 1981, that he had his own set of documents without Klein's signature, that he then picked up from Egon Dumler's office a completely signed set of agreements with Klein's signature on or about August 7, 1981, and the indisputable proposition that Peter Shukat did not have *exclusive* possession of the June 8, 1981 contracts throughout, compels the conclusion that there never was a basis to make the charge contained in paragraph 52 of the amended complaint (whatever LeFlore meant by such charge) or any other document tampering charge against Peter Shukat.

Reliance also cannot be properly placed by plaintiff's counsel on the overall submission of the case to the jury. The "forgery" and document tampering issues were taken away from the jury by the Court. Since no reasonable juror could believe such a claim, no basis in fact or law must have preceded [sic] its assertion.

The crux of Peter Shukat's Rule 11 motion against Ray LeFlore is that LeFlore, without basis, or with information that would indicate facts the very opposite of plaintiff's stated claims, made a serious charge of forgery and/or document tampering against a lawyer, which if it were ever proved to be true, would involve that lawyer in either a criminal or a disciplinary proceeding such that he could lose his license to practice law. The Court should follow that logic and correlate it with Peter Shukat's

sworn testimony that he had a conversation with LeFlore prior to the institution of Calloway's suit to the effect that if he did not turn over his papers, LeFlore would see that he was disbarred. LeFlore thus is deprived of any excuse or defense for his conduct, and sanctions for the fraudulent creation and maintenance of a lawsuit are mandated under Rule 11.

Thank you.

Respectfully yours,

Norman B. Arnoff

NBA:lkf/nba
cc: All Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____ X
NORTHERN J. CALLOWAY, :
individually, and on behalf of :
LMN PRODUCTIONS, INC., :
Plaintiff, :

82 Civ. 8697
(RWS)

against :

THE MARVEL ENTERTAIN- :
MENT GROUP, a Division of :
CADENCE INDUSTRIES :
CORPORATION, JAMES :
GALTON, AL BRODAX, :
MICHAEL S. KLEIN, LUIS :
QUIROS and, where neces- :
sary, LMN PRODUCTIONS, :
INC., :

Defendants. :
_____ X

THE MARVEL ENTERTAIN- :
MENT GROUP, a division of :
CADENCE INDUSTRIES :
CORPORATION, JAMES :
GALTON, AL BRODAX, :
LMN PRODUCTIONS, INC., :
MICHAEL KLEIN and LUIS :
QUIROS, :

AFFIDAVIT

Third-Party Plaintiffs, :

- against - :

DUMLER & GIROUX, THE :
SHUKAT COMPANY, LTD., :
SCOTT SHUKAT and PETER :
SHUKAT, ESQ., :

Third-Party Defendants. :
_____ X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK:

Ray L. Le Flore, being duly sworn, deposes and says:

1. By this affidavit, I formally attest to the facts and representations contained in my earlier letter to the Court, dated September 19, 1986, a copy of which is annexed as Exhibit A.

2. In further support of my representation, contained in that letter, that "Mr. Pavelic was intimately involved (and kept apprised) of all developments and strategy decisions in this action", I annex as Exhibit B copies of checks drawn on the account of the firm, Pavelic & Le Flore - signed by Mr. Pavelic - payable to various defendants' attorneys in satisfaction of the Court's order of June 24, 1985.

3. I have also ascertained from the books and records of such firm, that Mr. Pavelic's representations concerning payments by Northern J. Calloway to the firm, Pavelic & Le Flore, are false. The clearest example of such falsities is the deposit, on July 2, 1985, into the firm's account, of Mr. Calloway's check, in the amount of \$1,500.00, for reimbursement of Pavelic & Le Flore's checks to defendants' attorneys, described above.

4. Finally, in order to prevent the continuing confusion engendered by Mr. Pavelic's erroneous captions on papers submitted here and in the Court of Appeals, the Court is respectfully [sic] requested to enter an order formally confirming its denial of Mr. Pavelic's earlier motion for leave to plead on behalf of (and otherwise represent) the firm, Pavelic & Le Flore.

/s/ Ray L. Le Flore
Ray L. Le Flore

Sworn to before me
this 25th day of September, 1986

/s/ Mercedes Gumbs
Notary Public

Exhibit A

Ray L. LeFlore
Attorney at Law
645 Madison Avenue, 6th Floor
New York, New York 10022
(212) 319-7760

September 19, 1986

BY HAND

Honorable Robert W. Sweet
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Re: *Calloway v. Marvel et al.*

Dear Judge Sweet:

The affidavit of Radovan S. Pavelic, sworn to September 17, 1986, submitted in support of his putative motion for post-judgment relief, contains materially misleading statements of fact. Where, for example, Mr. Pavelic states there was no "partnership" until October 1984, or perhaps later, the books and records of the firm contradict him. Indeed, all federal tax returns filed for the partnership, for the year 1984, specifically state that such returns

for "Pavelic & LeFlore" are for the period "May 1, 1984 through December 31, 1984".

This Court's own files also contradict Mr. Pavelic's assertions regarding the case *Boorstein v. City of New York*, which was resolved in favor of our client there. The last papers filed in that action - on which Mr. Pavelic concedes he worked - bears the firm's cover sheets and backs and were submitted and signed;

Pavelic & LeFlore

By: _____
(A member of the firm)

While much of the remainder of Mr. Pavelic's affidavit relates to matters not now (or properly) before this Court, I do not believe I can properly permit demonstrable misstatements to remain unchallenged.

For purposes of the present motion, and to further correct Mr. Pavelic's affidavit, this Court should know that Mr. Pavelic was intimately involved (and kept apprised) of, all developments and strategy decisions in this action (*Calloway v. Marvel et al.*) and would obviously have benefited directly from any recovery in the same proportion as I, as a member of the firm (dissolved) Pavelic & LeFlore. My own diary entries also confirm - contrary to Mr. Pavelic's assertions - that I and Mr. Pavelic were engaged in meetings with Mr. Levites as early as November 5, 1985; he joined the firm March 3, 1986, not late March as Mr. Pavelic attests.

As the Pavelic Motion was untimely filed, and these facts and other matters raised by Mr. Pavelic should properly be addressed, I respectfully request additional time to do so.

Respectfully,

/s/ Ray L. LeFlore
Ray L. LeFlore

RLL:bd

cc: All Counsel
Mr. Northern J. Calloway
Radovan S. Pavelic, Esq.

Exhibit B

PAVELIĆ & LEFLORE

SPECIAL ACCOUNT

919 THIRD AVENUE

NEW YORK, NY 10022

1001

7/3 1985

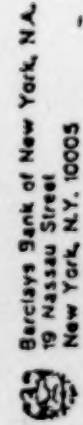
1-852
260PAY
TO THE
ORDER OF

Brown Wood Lucy Mitchell & Petty

\$ 500.-

Five hundred and no/100ths

DOLLARS

Barclays Bank of New York, N.A.
19 Nassau Street
New York, N.Y. 10005

R. 182 Pavelic

FOR June 25 Order

⑈00100⑈ ⑈026008523⑈ 050⑈85535⑈ 2⑈ ⑈0000050000⑈

PAVELIĆ & LEFLORE

SPECIAL ACCOUNT

919 THIRD AVENUE

NEW YORK, NY 10022

1002

7/3 1985

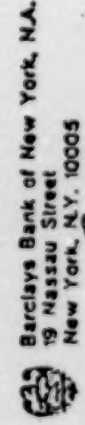
1-85
260PAY
TO THE
ORDER OF

Arnoff & Merin

\$ 500.-

Five hundred and no/100ths

DOLLARS

Barclays Bank of New York, N.A.
19 Nassau Street
New York, N.Y. 10005

R. 182 Pavelic

FOR June 25 Order

⑈001002⑈ ⑈026008523⑈ 050⑈85535⑈ 2⑈ ⑈0000050000⑈

PAVELIĆ & LEFLORE

SPECIAL ACCOUNT

919 THIRD AVENUE

NEW YORK, NY 10022

1003

7/3 1985

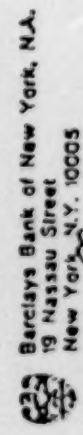
1-852
260PAY
TO THE
ORDER OF

Sonnenfeld Busner & Weinstein

\$ 500.-

Five hundred and no/100ths

DOLLARS

Barclays Bank of New York, N.A.
19 Nassau Street
New York, N.Y. 10005

R. 182 Pavelic

FOR June 25 Order

⑈001003⑈ ⑈026008523⑈ 050⑈85535⑈ 2⑈ ⑈0000050000⑈

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United States District Court
for the Southern District of New York

(p. 76) MR. ARNOFF: Good afternoon, your Honor. Good afternoon ladies and gentlemen of the jury. My name is Norman Arnoff. I'm the trial lawyer for Peter Shukat in this case.

Peter Shukat is a lawyer who represented the plaintiff Northern J. Calloway for over 11 years prior to this lawsuit which was filed in 1982. Calloway now sues Peter Shukat for phonying up three contract documents in issue in this case and for fraudulent representations, lies, inducing him to sign those contracts.

I'm here to represent a man's good name. I'm here to represent a man's honor.

Mr. Shukat categorically denies the charges. He (p. 77) is here and will be here from time to time throughout this trial as his professional responsibilities and commitments as a lawyer, as a practicing lawyer, permit.

As I understand the charges they are as follows:

The first charge is a claim of fraudulent alteration of the three contract documents in issue. Two sets of those documents.

Calloway claims he signed certain contracts on June 8, 1981. He claims Shukat, Peter Shukat, removed the pages preceding the signature page and slapped another document upon the signature page of the three different agreements in at least two and perhaps maybe more sets.

Calloway claims he signed those agreements as an officer of a corporation called Netta Productions Inc. He

says and he swears and he has sworn that he did not sign those agreements as an individual.

As I understand the fraudulent representations, they are three in number. The first being in respect to the June 8, 1981 agreements Peter Shukat affirmatively misrepresented that the documents would be signed and executed on behalf of Netta rather than Calloway.

In respect to the February, 1982 Marvel agreements, agreements distinct from and completely different from the June, 1981 agreements which are the option agreement, the screenwriter's agreement and the (p. 78) songwriter's agreement, that the February 1982 Marvel agreements had to be signed as a matter of prior contracts, whatever that means.

That Peter Shukat affirmatively misrepresented in February, 1982, that he would hold safe and secure the Marvel documents until Calloway's objections to the project were resolved.

The plaintiff claims that at the time Peter Shukat had no intention of holding these Marvel agreements safe and secure. Ladies and gentlemen of the jury, the proof will show in March-April, 1981, negotiations for the merchandising of David Roth's, Gavin Spencer's and Northern J. Calloway's Sky rider project began.

That Peter Shukat as a lawyer started to work in conjunction with another lawyer by the name of Jerry Morgenstern, a lawyer for Quiros and Klein who were Calloway's proposed financial and business partners in the project. Morgenstern was fired because he was not an entertainment lawyer.

Shukat started to prepare a screenwriter's agreement and a musical composition agreement. These agreements were to provide for the services of the creators of the project to the producer and publisher, LMN Corporation, Luis Quiros, Michael Klein and Northern J. Calloway.

(p. 79) In April-May, 1981, a corporation by the name of Netta Productions Inc. was to be used. This was a corporation that was wholly-owned by Calloway.

Netta was Calloway's grandmother. It was thought that this corporation might be used to protect Calloway's prospective profits in the Sky rider project against pending civil litigation in Nashville, Tennessee.

Thereafter, it was decided that this corporation, Netta, could not serve as such a shield and that Calloway was to be and should be the individually contracting party on the individual agreements, the June 8, 1981 agreements.

In the spring of 1981, Egon Dumler came in to replace Jerry Morgenstern as a lawyer for Quiros and Klein and LMN Productions. Peter Shukat worked on the documents with Egon Dumler. There were a variety of drafts. They were prepared in May and June and July of 1981.

In August, 1981, between Shukat and Egon Dumler, three agreements were prepared. They were the option agreement granting LMN an option as producer and publisher and the screenwriter's and music agreement providing for the services of Calloway and Spencer.

In August, 1981, Calloway signed these three agreements along with a shareholder's agreement dated as of June 8, 1981.

The proof will show that the reason the June 8, (p. 80) 1981 date was kept was that Calloway and Spencer wanted to get \$35,000 in preproduction expenses 75 days from June 8, 1981. Calloway wanted the money as soon as possible.

In August, 1981, the agreements were signed and there is not one signatory to those agreements other than Northern J. Calloway that disputes that those agreements were signed in August, were signed by themselves.

Some extensions were given by Scott and one by Peter Shukat because of the labor day weekend and the Jewish holidays and the difficulties of getting people together during that period, the close of the summer and early fall, 1981.

Those agreements were signed. The front money people provided the money, front money investors and Calloway received \$22,500 less his manager's commission of approximately \$3,000 plus \$6,000 in expenses. And he didn't according to the proof, offer to give that money back to anyone.

After that, Peter Shukat, the proof will show, was out of the picture on Sky rider until February, 1982. A deal was made with Marvel, the comic book people. Because it was the only deal in town to develop the project.

Calloway, in February, 1982, raised certain objections to Peter Shukat about the project. Peter wrote Egon Dumler and advised Calloway's signature should not be

(p. 81) deemed effective on the Marvel agreements until the conditions were met.

Dumler wrote back with Michael Klein's counter signature. The conditions were accepted. The proof will show that Calloway told Klein he was satisfied and the proof will show there was no escrow arrangement between Peter Shukat and Northern J. Calloway. Peter Shukat created an escrow arrangement in the best interest of his client with Egon Dumler and was informed in writing by Egon Dumler that all conditions that Peter Shukat put forward on behalf of his client, Northern J. Calloway, were satisfied. And the proof will show a documentary trail that evinces propriety of the transaction.

The proof will show that these documents, these contract documents, the June 8, 1981 agreements, were not fiddled with by anybody in an improper way and certainly not by Peter Shukat. Plaintiff claims that Calloway signed certain agreements on behalf of Netta, that Peter Shukat removed the text of those agreements and slapped a different text on this Calloway signature page.

Not so. There isn't a scintilla, there isn't a speck of physical evidence on those signature pages that shows the involvement of Netta Productions Inc.

What happened? The proof will show that Calloway signed the agreements in August, 1981. That (p. 82) Michael Klein's signature on behalf on LMN was not on the June 8, 1981 contracts at the time Calloway signed.

The proof will show that Egon Dumler's office added a place for Klein's signature and then Klein signed.

The proof will show that this was done because a signature was needed for an officer of LMN besides Northern J. Calloway. Calloway could not, in practical reality, sign the agreements on behalf of himself and LMN Productions. He couldn't be on both sides of the transaction at once. Especially contracts which were to be relied upon by people putting up money for a project and prospective people in the industry such as Marvel and Cadence Industries.

The proof will show, the documentary proof will show, that on August 13, 1981, Egon Dumler wrote to Peter Shukat and in substance he informed Shukat that Calloway signed the documents, Klein had not signed the documents, Calloway picked up the documents that he signed, the originals. Klein then signed the documents and Egon Dumler was providing to Peter Shukat and Northern Calloway, fully executed copies of the June 8, 1981 agreements including agreements signed by Michael Klein.

The proof will show that there is not one whit of difference to this case as to whether Calloway signed as an individual or on behalf of Netta Corporations.

(p. 83) And ladies and gentlemen, the proof will show that Calloway pocketed \$25,000 as a result of the execution and delivery of the June, 1981 agreements. The proof is in the pudding.

Respectfully, ladies and gentlemen, Calloway's mental condition, the proof will show, explains the nature of the charges against Peter Shukat, his lawyer, for more than 11 years. Calloway, the proof will show, formulated these charges against this group of defendants in late

April, 1982. The proof will show that during this late April, 1982 period, Calloway was suffering from a severe mental disorder. There was an incident in September, 1980, in Nashville, Tennessee. After the incident, Calloway was hospitalized in the Meharry Medical College, Middle Tennessee Mental Health Institute and the Mt. Sinai Hospital in New York. After discharge from hospitalization he came under the care of Dr. Hugh F. Butts in late 1980. He was treated with regular psychotherapy, thorazine, navane and anti-psychotic drugs. The evidence will show that he was diagnosed as a bi-polar manic depressive. The evidence will show that in 1982 in a legal proceeding a Tennessee court found Calloway mentally incompetent on the date of the incident on or about September 18, 1980. And the proof will further show, ladies and gentlemen, that on April 30th, 1982, Dr. Hugh F. Butts, Calloway's treating (p. 84) psychiatrist, wrote an Assistant United States Attorney for the Southern District of New York in this courthouse conducting a federal grand jury investigation that Calloway could not appear as a witness in May, 1982 -

MR. LEVITES: Judge.

THE COURT: Yes, I understand Mr. Levites. Look, ladies and gentlemen, that communication was simply to a federal lawyer in connection with a proceeding. That's the only significance of it. I should also say, I should have said at an earlier time but I can say that this is a civil case. There are no criminal implications here in connection with this case, as far as Mr. Calloway is concerned, there are no criminal implications whatsoever.

MR. ARNOFF: The proof will show, ladies and gentlemen of the jury, that Dr. Butts in this letter to an official of the United States, stated that Calloway could not appear as a witness in May, 1982, because he was psychiatrically disabled.

Ladies and gentlemen, the proof will show that Peter Shukat did nothing wrong. The proof will show that the complaint in this case, ladies and gentlemen, violates man's most important code of honor, the Ten Commandments: Thou shalt not bear false witness.

THE COURT: We'll take a brief recess, ladies and gentlemen.

* * *

(p. 1304) Calloway - Cross

Q. Page 28, line 14:

"Q. You do not have any idea of what a facsimile signature is"

MR. ARNOFF: There's an objection to form, your Honor.

THE COURT: Overruled.

Q. Continuing:

"A. Since it is not my signature on that original document, it is a signature placed on one document and then put on to another document.

"Q. Do you know how that is done?

"A. No."

Page 153, lines 20 to 23:

"Q. How are these facsimile?

"A. In a sense they imitate my signatures, they imitate my signature and therefore, I think the word facsimile was used."

Was that your testimony?

A. Yes, it was. In context with what I said before.

Q. Now, you never had a discussion about facsimile signatures with Peter Shukat, did you?

A. No, I did not.

Q. And to your knowledge, nobody, during the 13 to 14 years that Peter Shukat represented you as a lawyer and Scott Shukat acted as your business manager and loyal and (p. 1305) true friend, created a facsimile signature for you to impose on documents you chose not to sign in your own hand; true?

A. Not the mechanical device of a facsimile, no.

Q. You have no real evidence to believe that Peter Shukat forged your signature, do you?

A. I have the, I only have the evidence that the -

Q. Please answer the question, yes or no.

MR. LÉFLORE: Objection, your Honor.

THE COURT: Overruled.

Q. Yes or no?

A. No.

Q. And you have no real evidence to believe that he placed a facsimile signature of yours on the June 8, 1981 contract documents, do you?

MR. LeFLORE: Your Honor, would you instruct the witness as you did yesterday.

THE COURT: No.

A. Yes.

Q. And you have no real evidence to believe that he contrived the June 8, 1981 contract documents.

A. Yes, I do.

Q. You have no real evidence to believe that other than what Mr. LeFlore told you, true?

A. No.

(p. 1306) Q. Do you recall giving these sworn answers to these questions in this courthouse on June 13, 1984, page 53, excuse me, page 52, line 24:

"Q. What basis do you have to say that Peter Shukat improperly affixed your signature to the documents attached to Shukat Exhibit 3?"

The deposition exhibit for the June 13, 1985 deposition.

There is an objection as to the form. The question is then asked to be repeated. The record is read back and the answer is as follows:

"A. After my signing and initialing the original contracts, the contracts were left, the originals were left in the possession of Peter Shukat.

"Q. Is that the sole basis?

"A. Yes.

"Q. Did you retain copies of the originals?

"A. I did not.

"Q. Did you provide to anyone else besides Peter Shukat copies of the originals?

"A. I did not."

Page 59:

"Q. Did you ever give to a handwriting or a document examiner true specimens of your signature?

"A. No.

(p. 1307) "Q. Did you ever give to a handwriting or document examiner, documents which contained true originals of your signature?

"A. Not to my knowledge.

"Q. Were you ever asked to do so?

"A. No.

"Q. Other than not remembering signing the documents attached to Shukat Exhibit 3 and leaving certain original documents in the possession of Peter Shukat, copies of which you did not retain, do you have any other basis to say that the documents attached to Shukat 3 bear an improperly affixed facsimile signature?"

There was an objection to form. It was read back. I take it there's no further objection:

"Q. Of yours?

"A. No."

Was that your sworn testimony on June 13, 1985?

A. Yes, it was.

Q. And on page 61, sir, page 60, excuse me:

"Q. Did a handwriting or document examiner ever confirm to you your claim or contention that the documents attached to Shukat 3 bear improperly affixed facsimile signatures of yours?

"A. Not to me, no.

"Q. To anyone?

(p. 1308) "A. Yes.

"Q. Who?

"A. Mr. LeFlore.

"Q. Do you know who that handwriting or document examiner was?

"A. No, I don't."

Was that your sworn answers to my questions in this courthouse on June 13, 1985?

A. Yes, they were.

Q. Now over the years, sir, you gave Scott Shukat oral authority as your manager to sign your name on legal contracts, did you not?

A. On occasion I did, yes.

Q. And that authority was not dependent on any written power of attorney, was it?

A. It was not.

Q. And it wasn't just on occasion, was it?

A. It was just on occasion, yes.

Q. But the occasions were frequent, were they not?

A. It depended on the time frame that they came.

Q. Whether you were working, whether you were out of town, whether you were occupied elsewhere?

A. Yes. And that came -

Q. Whether you were indisposed.

A. And that came infrequently.

* * *

(p. 3487) P. Shukat - direct

Q. Did there come a time in June 1982 when you received a letter of gratitude from your client of approximately 13 years, Northern J. Calloway?

A. Yes, I did.

Q. And is this the letter of gratitude to the faithfulness of a friend?

A. I am grateful and indebted, yes.

Q. To whom is the letter addressed?

A. The letter is addressed to me and it's signed Northern J. Calloway.

Q. Dated what date, sir?

A. June 24, 1982.

(p. 3488) Q. Now, we know you were sued by Mr. Calloway in December 1982.

A. That's correct.

Q. Did there come a time, sir, when subsequent to that June 24 letter and prior to December 1982 you received a call from a person purporting to be the attorney in fact for Northern J. Calloway?

A. Yes.

Q. And who was that person?

A. Ray LeFlore.

Q. How did you know it was Ray LeFlore?

A. He identified himself as Raymond LeFlore.

Q. Concerning the subject matter of the Sky Rider or the Sky Rider files, what if any conversation did you have with Mr. LeFlore?

A. Mr. LeFlore advised me that he was representing Northern.

MR. LEVITES: We object and ask for an offer of proof at the sidebar, Judge. This is, in our view, very inappropriate.

THE COURT: We will have a brief recess.

(Jury left the courtroom)

MR. LeFLORE: If your Honor please, absent a foundation that Ray LeFlore was in fact an attorney in fact for Mr. Calloway and speaking in that connection -

(p. 3489) THE COURT: Wait. Are you saying that you were not authorized to speak for Calloway on this occasion?

MR. LeFLORE: I am saying it's hearsay. It's irrelevant. It's injecting into the record -

THE COURT: Slowly please. I have aged in the course of this trial and I am not as quick as I used to be.

You were authorized to speak for him on that occasion?

MR. LeFLORE: If I was representing him at that time I would have been authorized to speak for him, right.

THE COURT: So why isn't it a statement by a principal?

MR. LeFLORE: Because it's a statement by a lawyer. If he is saying that Mr. Calloway subsequently adopted the words in haec verba he is about to quote, fine. Otherwise it's uselessly injecting into the record the personalities of the record and attempting to put at issue -

THE COURT: What is the statement? Let's stop prancing around.

THE WITNESS: The statement was Mr. LeFlore called me and asked me for my files.

MR. ARNOFF: Which files?

THE WITNESS: All of my files including the Sky Rider files. I told Mr. LeFlore that I was owed a substantial amount of money and if he wanted my files and (p. 3490) he paid my bill I would be more than happy to turn them over to him. I also said if he couldn't afford to pay the bill I would be more than happy to take a sufficient bond to cover the bill.

MR. ARNOFF: How much was the bill?

THE WITNESS: 86 or \$8700. At that point I was threatened by Mr. LeFlore that if I did not turn the files over to him that he would get me disbarred. Following that statement from Mr. LeFlore I said to Mr. LeFlore, which I don't know if you really want on the record because it was rather graphic, I told him what he could do with himself because I was not about to be threatened or intimidated by him and if he wanted the files all he had to do is pay for them.

THE COURT: So what?

MR. ARNOFF: So what, your Honor? It shows this is a groundless complaint, a vindictive, malicious complaint and the jury has a right to know that.

THE COURT: I have that evidence now, for whatever use it will be.

I am going to sustain the objection. It will be a great shock to a lot of lawyers to know that the enforcement of an attorney's fee is ground for disbarment.

MR. LeFLORE: I don't intend to get things in this trial because of things said -

(p. 3491) THE WITNESS: But you did say it, Mr. LeFlore, and you are a liar because you did say it.

THE COURT: All right. I should have kept my mouth shut. All right.

(In open court-jury present)

Q. At or about the time Mr. LeFlore called you, which we just referred to, did you have an outstanding bill to Mr. Calloway?

A. Yes, I did.

Q. Approximately how much?

A. Between 8 and \$9,000.

Q. Was that for services that had been performed previously?

A. Yes, it was.

Q. Had those invoices ever been protested or objected to?

A. No, they were never protested.

Q. Have you ever been paid that \$8600 or so?

A. No.

Q. Would you take a look at the Dumler counterparts, court exhibits I believe 5 through 27, and will you look at those 18 signatures and would you look at those agreements, and before I sit down, in a loud clear way would you tell the ladies and gentlemen of the jury whether you ever forged any Calloway signatures,

[placed] any facsimile (p. 3492) signatures on those documents, contrived those documents or fraudulently altered those documents in any way, shape, manner or form, sir?

A. In a word, no.

MR. ARNOFF: Nothing further.

* * *

(p. 4270) MR. ARNOFF: Good afternoon. Our very fine and silent court reporter most of the time, Mr. Leon Zuck, advised me that at some points the roar of my objections exceeded the therapeutic dosage limit. He enjoined me and I obey that injunction to modulate.

If I have offended anybody, I apologize. I plead guilty with an explanation to that and to maybe an occasional smart remark with just the statement that I love what I do and sometimes my enthusiasm runs away with me. And I apologize if I have irritated anyone.

I will not read from any of the record, trusting in your recollections. I will give record references and I will make specific references to particular exhibits, and I would appreciate your courtesy if you find that of assistance, to review that specific evidence in the course of your deliberations.

I will not comment on the claims for punitive damages other than to say the one word, chutzpah, and to (p. 4271) state the story of the husband who murdered his wife and on the day of judgment pled for the judge's mercy on the grounds he was now a widower.

The claims or charges against Peter Shukat by Calloway now in this case for the jury's factual decision are as follows:

Peter Shukat lied to Calloway prior to or on June 8, 1981, that he was signing the option agreement, the screenwriter's agreement and the music agreement on behalf of Netta Productions Inc.

Calloway says he signed these agreements after reviewing them on Sunday, June 7, 1981, in Peter Shukat's office.

He signed the agreements on June 8, 1981 in Peter Shukat's office in reliance upon the statements of Peter Shukat concerning Netta.

Calloway says that Peter Shukat lied to Calloway when he said he would hold the three June 8, 1981 contracts in escrow when he had no intent to perform that stated obligation.

Calloway claims Peter Shukat lied to him on Labor Day, September 7, 1981, when he said the front money was in the bank on September 5, 1981, in order to extend and keep alive the LMN option.

Calloway says he discovered this lie when he (p. 4272) reviewed the LMN bank statements and deposits in March 1982.

Calloway states that Peter Shukat lied to Calloway in February 1982, when he said he would hold secure in his escrow the Marvel agreements pending satisfaction of certain objections and conditions and that Peter Shukat had no intent to perform.

Ladies and gentlemen, the evolution of these charges and how they came about to me, and hopefully to you, is demonstrable of their falsity.

The first point of departure are the suspicions in late April, 1982 of the conduct of Peter Shukat and others which led to the charges in this suit, as stated in a sworn affidavit of Calloway, dated December 8, 1984, paragraphs 2 and 3, record references pages 1280 and 1281.

This affidavit, as Calloway admitted, was jointly drafted by himself and his present attorney, Mr. Ray LeFlore, and then sworn to by Calloway.

Dr. Rohrs' expert testimony that Calloway in late April 1982 was in relapse from a bi-polar manic depressive disorder diagnosed by a number of psychiatrists, including Calloway's own psychiatrist, Dr. Hugh F. Butts.

Calloway had an excessive lithium level in his system as evidenced by a chemical test of April 27, 1982, which condition could mimic the disorder and possibly cause delusions.

(p. 4273) Beaulieu's testimony that she received a call April 23, 1982 at approximately 2 a.m. in the morning that Calloway was scared because someone, unidentified, was following him.

Lionel Barrett's testimony that on April 23, 1982 about 3 a.m. in the morning, he received a call from Calloway, who said Dr. Klein had poisoned him in September 1980, when admittedly, neither Calloway nor Klein knew one another, leads one to believe that Calloway was out of his mind in late April 1982 when he hatched the charges against Peter Shukat and the others.

Between August and December 1982, Calloway didn't speak to Peter Shukat about bringing the charges in this lawsuit. LeFlore contacted Peter Shukat and did

not make any inquiry as to whether the June 8, 1981 contracts were genuine.

The lawsuit was commenced in December 1982. The lawsuit was commenced and there was no specifically worded charge that Peter Shukat forged, altered or placed facsimile signatures on the agreements or made any fraudulent oral representations as now alleged in this court.

The complaint was signed and certified by the plaintiff's counsel, Ray LeFlore. In July, 1982, an amended complaint was signed and certified (p. 4274) and it contained the specific allegation, paragraph 52, which alleges that Peter Shukat affixed a facsimile signature on the agreements, the June 8, 1981 agreements, and the complaint did not contain any charges of oral misrepresentations by Peter Shukat as alleged now in this courtroom.

In April 1984, Calloway swears to an affidavit drafted by Mr. LeFlore in opposition to the Defendants' motion for summary dismissal, claiming that Shukat contrived the June 8, 1981 contracts, perhaps forged by unidentified others, and then in another separate and distinct paragraph, claiming the documents were actually forged by the defendants.

In November, 1984, Pearl Tytell examines the June 8, 1981 contracts, the Egon Dumler original set and three checks with five signatures of Calloway furnished by Mr. LeFlore, and opines that the June 8, 1981 contracts were probably written by the same person, and possibly by the writer of the checks, Northern J. Calloway.

She doesn't entertain the thought the signatures are facsimile, and she doesn't conclude that they are nongenuine.

Notwithstanding, paragraph 52 was not withdrawn, even after this case began.

As late as March 25, 1986, when plaintiff, (p. 4275) through his attorney, Ray LeFlore, serves a pretrial order, paragraph 52 of the amended complaint appears charging Peter Shukat with putting a facsimile signature on the June 1981 contracts.

The sole basis, Calloway says, that he had to make the claim of document tampering against Peter Shukat, was as follows:

Shukat supposedly had access to the contracts exclusively during the time of their preparation, execution and circulation. LeFlore exhibited to Calloway - Xeroxed the photocopy, June 8, 1981 contracts in LeFlore's office in October 1982, after production by Dumler, although Calloway has acknowledged he has difficulty recognizing and identifying his own signature.

LeFlore told him the signatures were forged. Record reference, pages 1300 to 1308, 1308, 1322, 1325 to 1326, 1358, 1363, pages 1591 through 1598.

Calloway did not withdraw the claim of facsimile or fraudulent alteration from the stand in this case. All you have to do is look at page 1594 of the trial transcript.

For the first time in this case, by letter dated April 1, 1986, plaintiff's counsel, Ray Levites, amends prior contentions by adding the claims of fraudulent oral misrepresentations against Peter Shukat and not subtracting one whit from any of the pleadings, including paragraph 52.

(p. 4276) The present charges should be rejected as a stale afterthought which the truth already buried when it repudiated beyond anyone's doubt the claims of fraudulent alteration of the agreements and the nongenuineness of the 18 Calloway signatures appearing on the two extant sets.

A charge that one signs an agreement because another lies to him is an admission that the signature is true and the document is what it purports to be.

A charge that one never signed a document or that it was altered after signature, is a concession that one did not sign the agreement in its present form.

The two contentions of plaintiff that he signed but was lied to and that he did not sign the June 8, 1981 contracts are mutually exclusive propositions. The fact that the plaintiff has maintained these inconsistent positions should require the rejection of both claims as a matter of simple logic and common sense.

What is the proof or nonproof relating to the claims of fraudulent misrepresentations by Peter Shukat? I believe the evidence compels their rejection.

Plaintiff's counsel said that Calloway testified that Shukat told him on June 8, 1981 that he was signing on behalf of Netta Productions Inc. Calloway, by his words,

attempted to create such an innuendo, but an examination of the precise testimony of Calloway shows that even Calloway (p. 4277) could not so blatantly lie as his lawyer spoke to you. Record reference: Pages 618 through 620. 628 through 631. 735 through 739. 1319, 1321. 1334 through 1335.

The unsigned Netta drafts of the writer's agreement contain a grant clause, paragraph 3 page 3, with operative language for LMN to change and modify. There is no difference in the drafts and the final agreements on this significant point. How, then, is the representation material or important?

A misrepresentation, to be actionable, as the court will instruct you, must be material.

Plaintiff's counsel argues that Netta is material because Scott Shukat had no power of attorney under the management agreement dated May 31, 1981, to extend the option in September, 1981. Record reference: page 623.

Ladies and gentlemen, that is the grossest Futurenaut of all time. Even the centerpiece of Mr. LeFlore's villany, the likable resident of Weston, Connecticut and the animator of Popeye could never create such a fiction. It was not, nor could it be foreseen in May, June, 1981, when Calloway said he signed first the management agreement and then the June 8, 1981 contracts, that extensions would have to be given in September 1981, after Calloway says he granted in August, 1981 an extension (p. 4278) and then decided to refuse to grant further extensions.

Where is the misstatement of a present fact with an actual intent to deceive in May or June, 1981?

The very statement of the proposition compels the rejection of the plaintiff's claim.

Scott Shukat, according to Calloway, had oral authority irrespective of the written agreement to sign Calloway's name to the contracts. This was a course of conduct over the years. Scott always consulted, and this was done for Calloway's convenience when he was out of town or working.

In September, 1981, he admittedly was working on Louie. This is supported by the excerpt of testimony that I read to you on Monday of this week from Calloway on June 13, 1985 in his sworn deposition in this courthouse, and page 869 and 870 in the trial transcript.

There were other agreements signed in August 1981. The Louie agreement signed August 6, 1981. And the LMN shareholder's agreement. They were not signed on behalf of Netta, but by Calloway individually.

It doesn't make sense in order to achieve artistic control and the tax consequences as Calloway claims, that he would sign some of the agreements on behalf of his alter ego loan-out company, and the others as an individual. Record reference: page 606, 668 through 669, (p. 4279) 837, 838 through 839, 869 through 871, Court Exhibit 31, Defendants' Exhibit BB.

There is a later Louie document, but it doesn't say Netta Productions, Inc. and it is not signed by Calloway or anyone acting on his behalf.

Calloway's understanding that he signed the June 8, 1981 contracts as an individual is evidenced by the fact that Netta Productions, Inc. does not appear near or around his signature on any of the signature pages for the two sets of agreements containing what is now an established fact, of the genuineness of Calloway's signature. Record reference: Page 694 through 714.

Mr. LeFlore alights on the word "by" next to some and certainly not the majority of Calloway's signatures on the June 8, 1981 contracts. Respectfully, ladies and gentlemen, if you buy that, you buy that Big Bird will be instructing you on the law tonight in your deliberation in this case.

Mr. LeFlore presents claims that the representation page on the writer's agreement and the music agreement makes inadvertent reference to Netta. Egon Dumler explained that he wanted to keep the representation that Roth and Miller had no claim to the artistic property in the agreement, because that specific representation of Calloway was not in the text of the agreement, and you can (p. 4280) verify that by your own examination, and I'm sure you did, of the body of those two agreements.

Calloway was an artist who signed many contracts over the years, and he knew he was not executing these agreements on behalf of anyone but himself and LMN Productions.

Ladies and gentlemen, there is a series of correspondence and internal memos meeting the evidentiary tests of admissibility, which evidences the agreements were signed in August 1981 and not in June 1981, that Calloway received and retained his own set, and that he either

signed in Scott Shukat's office or Egon Dumler's office and not in Peter Shukat's office. Record references: Page 1198. 1200 through 1201. 1268 through 1270. Exhibits: Defendants' Exhibits DK, DL, DM. Peter Shukat F, A and B. Peter Shukat G. Defendant DN, Defendant CC, Defendant DO, Defendant CE.

If he did not sign when and where he said he signed, it is virtually certain in this case that he did not sign with a false understanding caused by Peter Shukat that he was signing for Netta.

Plaintiff argues that Peter made false representations that he would hold three June 8, 1981 contracts in escrow pursuant to paragraph 2 of the option agreement. Ladies and gentlemen, the sole condition for (p. 4281) the exercise of the option was the payment of the \$35,000 front money to Calloway and Spencer. It was the sole condition for the signatures becoming effective, the payment of that \$35,000.

The second \$25,000 referred to in paragraph 4A of the music agreement could be paid only when drawings for the movie commenced. This condition had to take place before this second \$25,000 was paid. Record reference: Page 1343.

The exercise of the option could not await that condition. Otherwise you would have the absurd situation of \$35,000 being paid to Calloway and Spencer for nothing, and the possibility that the drawings never would be commenced and no option would come into existence at all. That's not what the reasonable parties other than Calloway intended. Irrespective, Peter Shukat, along with

Egon Dumler believed this was the intent of the contracting parties. So this cannot be the basis for a bad faith claim, a fraud claim against Peter Shukat.

There is another claim against Peter Shukat for false representation, that on Labor Day, September 7, 1981, Peter lied to Calloway that the money was in the bank on September 5, 1981. This is an absurdity. Calloway says he discovers this misrepresented fact by the Shukat brothers in March, 1982.

(p. 4282) Why, then, is this claim not asserted until April 1, 1986? Why, then, does Calloway revoke his "lying manager's power of attorney" only in August 1982? Why then does Calloway write Peter Shukat a letter of eternal gratitude, June 24, 1982, with the assistance of his secretary and fiancée and Mr. LeFlore's erstwhile paralegal in this case, Miss Beaulieu. Record reference: Pages 742 to 743. 755 to 757. 758, 860 and 1350.

Peter and Scott Shukat deny the specific words and misrepresentations claimed. The reasonable construction, ladies and gentlemen, of what was possibly said was that the front money people's commitments were genuine. This tends to prove Calloway spoke to the Shukats prior to the extensions and that he in fact approved the extensions when he received an opinion that he had a real deal with LMN and the front money people.

And this is consistent with the testimony of both Shukats that they were to do everything in their power everything in their power to make this deal work for their client of long years.

There is a claim of misrepresentation that Peter would hold the Marvel agreements in escrow with no intent to perform. Ladies and gentlemen, there is no written escrow or any type of escrow between Peter and Northern J. Calloway in February 1982. Peter unilaterally created an (p. 4283) escrow restricting Dumler's ability to release the Marvel agreements pending resolution of Calloway's objections. The documentary trail supports Peter's version.

Your attention is respectfully drawn to Defendants' Exhibits CB, CF and CG.

The objections were satisfied and Peter Shukat could reasonably rely on Egon Dumler's written representations and the counter signature of Calloway's then partner, Dr. Michael Klein.

But what was he to rely upon? Peter Shukat wasn't an escrow agent. He wasn't holding anything. Peter Shukat created an escrow in February 1982 for Egon Dumler to hold the Marvel agreements pending the satisfaction and the conditions - satisfaction of the conditions and objections raised by Calloway. There is no showing that Peter Shukat released anything. The proof is to the contrary.

Ladies and gentlemen, Northern J. Calloway's credibility and the credibility of his complaints with varying positions and claims as to Peter Shukat should be judged in pertinent part on the following:

On January 29, 1982, a court in Tennessee declared Calloway mentally incompetent for acts done in September 1982. Dr. Rohrs opined that based on Calloway's

psychiatric history and the opinions of other psychiatrists (p. 4284) and the treating psychiatrist, Dr. Butts, the admitted acts and declarations in late April, 1982 of Calloway that either he was in relapse for a serious psychotic disorder or had excessive lithium carbonate in his system; that these symptoms could mimic and produce a condition such as the disease itself and/or delusions.

Butts was not called by the plaintiff to rebut the expert opinion of Dr. Rohrs. The claim of document tampering and imitating Calloway's signature, which maintained this lawsuit, born of insanity and maintained by the certifications of dishonesties throughout, that can be a basis for your judgment as to credibility.

These claims stated many times in this wearisome and obnoxious lawsuit have now been clearly repudiated.

Nancy Beaulieu's testimony does not bolster Northern J. Calloway's credibility. Reference is made to May 16, 1982 and the remarks allegedly imputed, allegedly said by Peter Shukat, do what I tell you to do, sign what I tell you to sign.

(p. 4285) There is no diary entry for this date. As a matter of fact, the diary doesn't contain a significant number of May dates, including May 16, 1982, and her notes and diary, according to her own admission, was trashed. She had an interest and does have an interest in the outcome of this case.

Calloway had no serious purpose in developing the Sky Rider in 1982. He wanted to walk away from the deal. He said all he needed in 1982 was \$40,000 to make

his presentation to potential animation houses. He said he had unencumbered assets of \$40,000 that he could have borrowed against but he did not choose to do so because of the lame excuse of this litigation.

In November 1982 when the property reverted to him by the expiration of the option he did nothing but bring this suit against those who were loyal to him for many years and to those who he and his lawyers speculated had deep pockets. And he lied, ladies and gentlemen, and gave testimony unworthy of belief.

Defendant Peter Shukat Exhibit D, record reference page 1390, 1391, 1587 and 1589, the June 24, 1982 "eternal gratitude" letter in sworn deposition before Special Master Bloom, Calloway said the writing of that letter had nothing to do with the Sky Rider project. It was prompted by Peter Shukat's loyalty and effort in (p. 4286) Nashville, Tennessee. Before his Honor, Judge Sweet, and the ladies and gentlemen of the jury to serve as a peg to get a piece of evidence in for Mr. LeFlore he said the June 24, 1982 letter was prompted by the Sky Rider project.

Mr. LeFlore made reference to merry old England and the derivation of the terminology red herring. Well, there was a statement in merry old England, "you can't run with the hares and hunt with the hounds," and I will further refine it for this case. "You can't ride 2 horses with one Assagei." That is the last attempt at humor I will make, ladies and gentlemen, because I admit that I can't top my friend Sol Slotnick.

But you have heard stories and allusions to stories in this court proceeding and I am going to make a reference to a story. I am not going to tell it because you know it.

It's a story of another lawyer who became a president and who said "a tarnished lawyer is a homeless man." He also made reference to a prejudice that in the popular mind some may feel to the lawyers. I hope that is not with you in these proceedings and I hope if it is it can be displaced.

Lincoln said, "There is a vague, popular belief that lawyers are necessarily dishonest. I say vague because when we consider to what extent confidence and honors are reposed and conferred upon lawyers by the people, (p. 4287) it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief resolve to be honest at all events and if in your own judgment you cannot be an honest lawyer resolve to be honest without being a lawyer. Choose some other occupation rather than one in the choosing of which you do in advance consent to be a knave."

There is no evidence in this case, and there never was, from the commencement of the complaint to the final sworn testimony of the witnesses, that Peter Shukat did anything wrong, that he acted in any way, shape, manner or form as a knave.

Ladies and gentlemen, the evidence points elsewhere.

Reputation for truth, honor, professional integrity are not cherished values of a romantic and distant past. But they are matters of importance today. They should not be destroyed or attempted to be destroyed by a cheap shot

at an unearned reward. By your verdict and your judgment in this case, by the law that will be instructed to you by Judge Sweet, and by the evidence that I know you have analyzed and heard, I ask you to send a message by your verdict and your judgment that this silly, (p. 4288) baseless, vexatious suit, never susceptible of clear definition of thought, clearness and specificity of charges in the language by which the accusations were made, never supported by any foundation in fact, that these type of lawsuits will not and should not be brought.

The right of access to our courts is a cherished privilege. It is a right of all citizens. One citizen should not abuse the process, should not consume the time of juries or judges with claims that do not make sense and are not factually based.

From a common heritage and perhaps from a common worship compelling voices speak from the deep mist of time, don't falsely accuse someone else of wrongdoing.

Ladies and gentlemen, that is the reason for the oath. That is the conscience of the law. This case offends the conscience of the law.

Thank you.

* * *

(p. 1) UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORTHERN J. CALLOWAY, etc.,

Plaintiff,

82 Civ. 8697

v.

THE MARVEL ENTERTAINMENT GROUP,
et al.,

Defendants.

THE MARVEL ENTERTAINMENT GROUP,
et al.,

Third-Party Plaintiffs,

v.

DUMLER & GIROUX, et al.,

Third-Party Defendants.

September 12, 1986
2:45 p.m.

Before:

HON. ROBERT W. SWEET,

District Judge

APPEARANCES:

RAY L. LeFLORE pro se

RADOVAN S. PAVELIC pro se
Attorney for Pavelic & LeFlore

SANTORA & MC KAY
Attorneys for Al Brodax

ROBERT B. MC KAY
of Counsel

(p. 2) BROWN & WOOD
Attorneys for Luis Quiros

STUART J. M. BRESLOW
of Counsel

SOL SLOTNIK
Attorney for Peter S. Shukat

FREDERICK SHARF
Attorney for the Marvel Entertainment Group

NORMAN ARNOFF
Attorney for

BROOKMAN
Attorney for Michael S. Klein

(Case called)

THE COURT: Nobody is pleased with the outcome and everybody seeks some sort of relief. I would appreciate it if you would advise me of the relief which you seek and then tell me why you want it and then we will go around once more and everybody can tell me what they think of the other person's party's requests.

MR. LeFLORE: No relief sought at this time, your Honor.

THE COURT: Mr. Pavelic, you're admitted for the purposes of this hearing.

MR. PAVELIC: Your Honor, I withdraw that part of my motion because I have determined that I was (p. 3) previously admitted in 1976.

THE COURT: That solves that problem.

MR. PAVELIC: It gives me no pleasure, to say the least, to be sitting on the opposite side of the table of my partner.

I seek the following relief: I seek a 30-day stay in the entry of this judgment, for principally three reasons:

1. As you have been advised, the firm of Pavelic & LeFlore was dissolved by me in August of 1986. Our financial and affairs of clients are, at best, in disarray. I personally need additional time. While I cannot speak for Mr. LeFlore, I believe he also needs time to get his affairs in order.

I also note Mr. LeFlore is opposing my pro se representation of the firm of Pavelic & LeFlore, which is now being wound up.

I ask the Court, first of all, to permit me to represent the interests of the firm of Pavelic & LeFlore, which to some regard are at odds with the interests of Mr. LeFlore personally, and I also request that the firm be given 30 days to find counsel and have counsel familiarize himself or themselves with the voluminous papers in this case so that the firm's interests can be adequately protected.

(p. 4) Also, while I do not represent Mr. Calloway, I do believe that the Court should consider in the interest of equity assisting Mr. Calloway to obtain representation through the pro se office or some other fashion to protect his interests which may be at odds with those of the interest of the firm of Pavelic & LeFlore.

MR. SCHARF: Your Honor, the only relief that we seek that is not sought also by Mr. Arnoff concerns the matter of what the actual amounts of billings are for the defendants who are to share in the \$200,000 fund.

There were two -

THE COURT: Give me the numbers.

MR. SCHARF: The figures in your Honor's rulings -

THE COURT: What do you think are the appropriate numbers?

MR. SCHARF: The sum which you Honor had stated for us, 297,000, plus the additional sum set forth by my affidavit sworn to on Tuesday of this week, which was 20,580, which represent the fees for the two months of January and February 1986, previously estimated in my papers but now fixed.

THE COURT: So you want the total amount of your fees increased by that amount?

MR. SCHARF: By that amount.

We consent in that respect to the similar (p. 5) request on the part of Mr. Arnoff. We also join in his additional request which he'll be stating for himself.

THE COURT: Mr. McKay.

MR. MC KAY: Nothing to add to my papers, your Honor, which requested that the Special Master's fees be permitted as costs and also that the -

THE COURT: Now, as it now stands - and correct me if I'm wrong - there was an allocation, simply a numerical allocation, was there not? How did the Special Master come to what I believe was my determination, how did he allocate his fee?

MR. MC KAY: Well, his original decision was to divide them equally among each party. Then he eliminated LMN as an obligor, and then there was some question as to Scott Shukat and SCL, but they seem to have been eliminated.

So, in effect, he put the burden on the remaining parties, equally.

THE COURT: So that your request is that all of the Special Master's fees be determined to be costs and paid by the plaintiff?

MR. MC KAY: Yes, your Honor.

THE COURT: And that's a total of?

MR. MC KAY: I don't have the total number.

THE COURT: It would also require some refiguring wouldn't it, because amounts have been paid under the (p. 6) scheme that he devised?

MR. MC KAY: There is some confusion as to who still owes what. The total number is probably in the vicinity of 40,000, 35,000, something like that.

THE COURT: And would you also want Scott and SCL to be added - assume for the moment that I conclude that I'm not going to tax it as costs but that it will remain as it had been intended, what's your view on Scott? Do you want Scott and SCL to be added as parties?

MR. MC KAY: No.

That the award be joint and several against the plaintiff counsel and counsel.

MR. ARNOFF: Your Honor, I wrote a letter to the Court in August. I spoke to your law clerk this week. I seem to get the impression that the letter was satisfactory for the purposes of the papers and this proceeding.

In essence, my points are as follows:

1. I think there was an erroneous undercalculation of the proportional share of Peter Shukat of \$151,000, when in essence the fees were \$171,000.

THE COURT: How so?

MR. ARNOFF: \$179,000.

All the legal bills were not -

THE COURT: All were not in?

MR. ARNOFF: Right.

(p. 7) Attached to the bill of cost, even though to a decree it was surplusage, was all of the legal bills submitted to the American Home Insurance Company. Your Honor did not give any consideration for out-of-pocket "disbursements as well, which were part of the bills that were submitted to the insurer.

THE COURT: Excuse me, but what happened to out of pocket - are you talking about legal costs?

MR. ARNOFF: I'm not talking about the transcript costs, which I'll address in a minute or so. I'm talking about Federal Express, in-house Xeroxing, those kinds of items.

THE COURT: And those were simply not calculated?

MR. ARNOFF: Those were not part of your calculations. That's point one.

Point 2 - and that really only goes to the adequate share of Shukat versus the other defendants.

Point 2. I thought your Honor was wrong in not giving some sort of a suitable award to Peter Shukat for the \$24,000 in expert witness fees, i.e., the psychiatry and the document examiner, because those two issues, the forgery issue and the psychiatry issue, he was the one through his professional liability insurer which bore the total cost of the expert witness fees.

In addition to that, when those depositions of (p. 8) the psychiatrists and the document examiners were supervised, we bore the total costs with respect to the Special Master. That's point 2.

Point 3, respectfully, your Honor, is I think you're wrong on not permitting us to tax the Special Master's cost. As I read the Rule 11 decision, you said because we didn't formally move, we were not entitled to get those costs. I believe we properly complied with the local rules in submitting a bill of costs on notice. I believe that the spirit of your August 1985 order was that the Special Master's costs would be borne by the parties on a proportionate basis and that ultimately based on the outcome of the litigation, there would be maybe an appropriate reallocation as to the losing party. I then, along with other counsel, followed the procedures set out in the local rules, and I would hate to lose those costs really based not on substance but based on technical procedure. That's point 3.

Point 4, your Honor, respectfully, is the transcript costs. As I understand the local rules on transcript costs, if the depositions are read into the record, as many of these depositions were, you're entitled to the transcripts

as costs. You disallowed specifically our application for deposition transcripts.

THE COURT: When?

(p. 9) MR. ARNOFF: In your Rule 11 decision.

THE COURT: Did I say why?

MR. ARNOFF: You awarded Mr. Sharf the transcript costs of the trial, disallowed Peter Shukat's application. I specifically discussed that with the judgment clerk. I did take a look at the local rule. It was my understanding, while it is not really totally clear, that if depositions are read into the record, which many of these depositions were, and we had available copies that we had purchased prior to trial, and they became evidence at the trial, we were entitled to those deposition transcripts as costs.

I should add, respectfully, your Honor, while Mr. Scharf Xeroxed the trial transcripts for everybody and his client bore the cost of that, similarly Shukat -

THE COURT: Well, let's stick with the deposition transcripts.

Do you have any understanding - this is a somewhat unfair question. But why did I do what I did? Do you know?

MR. ARNOFF: Your reason was, as Mr. Scharf points out to me, page 26. Apparently Peter Shukat did not order the transcripts during the trial. Thus lacking any explanation by Peter Shukat, it appears that these

costs were connected to pretrial deposition. So you disallowed (p. 10) it basically because they were pretrial depositions. What I'm saying to the Court is I think there is a permissible interpretation of the local rule.

THE COURT: The costs were taxed by the clerk; right?

MR. ARNOFF: Right.

THE COURT: The prevailing party got the costs of the depositions which were introduced; right?

MR. ARNOFF: No.

THE COURT: Scharf did?

MR. SCHARF: No, your Honor. We taxed only the cost of the trial transcripts, because we did not offer any of the deposition transcripts.

THE COURT: And you were the only one who applied for -

MR. ARNOFF: Right.

THE COURT: What did the clerk do?

MR. ARNOFF: The clerk approved it based on my showing him the local rule, and then you knocked it out.

THE COURT: But I think it is evident from that that we were talking two different things.

MR. ARNOFF: Absolutely, you Honor.

THE COURT: Was that issue litigated before me, the deposition cost issue, because I don't have any recollection of it?

(p. 11) MR. ARNOFF: With all due respect, even if it was by implication, your Honor, you must have done something because you knocked out the application of costs after the clerk had approved it in the bill of costs.

MR. LeFLORE: There were papers submitted by plaintiff in that regard, your Honor.

MR. ARNOFF: While Mr. Scharf picked up the trial transcripts, Shukat picked up expert witness fees, extra Special Master's fees. It was to avoid an administrative nightmare.

The point, your Honor, as your Honor noted, that the aggregate billing which the plaintiff's counsel and the plaintiff did not challenge either as erroneous or inherently unreasonable, nor did your Honor challenge it as an appropriate figure for four years of very extensive litigation, was \$900,000. Yet your Honor awarded \$200,000 with an expression of judicial compassion, that even though I'm an adversary at this point I do not disrespect, and maybe it's a practical way or probably is the only practical way of getting a realistic sum to make the parties partially whole.

What I don't think your Honor appropriately did is provide in your decision some form of security that if we're already getting a piece of the whole, a small fraction of the whole, there should be real security that (p. 12) the \$900,000 actually comes back to the defendants.

Not to seem too blood thirsty, either, I should note that my client who was defended by a professional liability insurer and whose costs were picked up by the professional liability insurer and who I know did not

have any other claim in his history of practicing law, as a result of this claim had a 100 percent increase in his professional liability insurance which would amount to, in essence for a single practitioner, approximately 10 percent of his gross fees, which is a significant impact. That's an injustice that has come out of this case to him.

I would appropriately urge the Court that if the Rule 11 sanctions that were awarded, which I don't dispute in amount, actually come back, it may very well be that the professional liability insurer and the brokers who consider premiums and ratings, etc., etc., may take another realistic view with respect to Peter Shukat. I don't think after the evidence in this case and what we all know now to be the merits of this case, that type of injustice should befall Peter Shukat without your Honor's consideration.

MR. SLOTNIK: We would ask the judgment as proposed by Brown & Wood to be signed by the Court as quickly as possible.

I would note that Mr. LeFlore, having taken the position he seeks no relief, apparently has no objection to (p. 13) the signing of the judgment.

Mr. Calloway, who now either apparently is pro se but saw fit not to be here today, as best as I can tell, has not objected in any written form that I'm aware of to the entry of the judgment. The sole objection comes from Mr. Pavelic in a situation in which he was aware as of August 4 with respect to the Court's opinion and order and on or about two weeks later that a judgment would be proposed, has now had approximately six weeks to do something about this and chose for whatever reasons to wait until the proverbial eleventh hour.

If the Court signs the judgment under Rule 60 or 62, there is an automatic ten-day additional stay before we can take any enforcement procedures.

And in connection with the request to enter the judgment, I would also add that Mr. Pavelic's request for a stay either afternoon after the judgment is entertained by the Court, there is no written evidence before the Court, apart from some vague statements in his affidavit that neither he nor Mr. LeFlore, who pointedly put in no papers, nor Mr. Calloway, who also put in no papers, do not have assets available so as to bond the judgment. Even if that were true, Judge, I would submit that bonding a portion of the judgment pending the appeal is preferable to their walking away without posting any money at all.

(p. 14) The Court knows how much everyone suffered in terms of economics, professionally and ethically. I'm talking now about this being a dollars and cents as opposed to any other judgment.

That's the relief we seek from the Court. If the Court wishes or if you are entertaining the idea of reallocating the Special Master fees so as to include The Shukat Company and Scott Shukat, I will speak to that briefly. But in my letter that I wrote to the Special Master, with a copy to you, about a week ago, I pointed out that in pretrial conference you had said that only if we made use of the discovery supervised by the Special Master would we be required to bear our allocatable portion of the fees. We did not, your Honor, through the six weeks of the trial, never. I never used any testimony or had any questions for the psychiatric witnesses, the handwriting experts,

and none of it certainly was based upon anything that had gone on during the discovery.

So I would ask you to reaffirm your prior ruling in that regard.

MR. BROOKMAN: In regard to the Special Master's fees, the position of Michael Klein is that discovery involving Michael Klein was completed prior to the appointment of the Special Master. Both the depositions of the plaintiff and of the defendant Michael Klein was (p. 15) totally complete when this Special Master was appointed Michael Klein, before the master, made objection to be included in that fee arrangement and that was declined. Yet later, on a motion by Mr. Slotnik, you granted that elimination of his client to the Special Master.

When we reiterated our request about the Special Master some time prior to trial, if your honor recalls, there was some discussion about that the other fees be picked up by the other defendants who had used the Special Master's good offices and had deeper pockets than Michael Klein. That discussion, because of the start of the trial, never culminated in a reallocation and elimination of Michael Klein's obligation as it now stands to the Special Master.

I would also note that my client has paid a portion to the Special Master and there is a portion still outstanding under the current arrangement. I think that any fees paid by him should be reimbursed and that he should not be required to pay any fees to the Special Master. He's in no different position than the Shukat interest represented by Mr. Slotnik. He should not be burdened with that fee.

As to the allocation, reallocation of the award made by the Court, the Court might be able to take into consideration that Michael Klein, and perhaps Mr. Slotnik's (p. 16) clients, were the only defendants that were not represented in essence by insurance carriers and therefore their moneys are coming out of their pockets. There is no deep pockets, so to speak, that Michael Klein has to rely upon.

The fees that were placed in the order and which the Court recognized, were fees that are partially paid by Michael Klein. And perhaps two-thirds of it are still outstanding. There is a need here to recognize the fact of the relative capacities of the defendants or the people paying on their behalf.

If your Honor wishes, the defendant Klein joins in with the applications of some of the other defendants that the award should be made joint and several as against both the Calloway and his attorneys. In any respect, it certainly, based upon your own opinion, your Honor, the working of plaintiff's counsel created the atmosphere that that award was necessary.

Lastly, your Honor, if the Court considers staying the judgment for any reason whatsoever for any length of time, it certainly should be on condition that we have full financial disclosure from Mr. Calloway and from the partners of the law firm. We have had no such disclosure, and the very broad swings should have alerted the Court to the fact that maybe individually they have assets that they are not disclosing.

(p. 17) MR. BRESLOW: Your Honor, the primary relief that I seek is that you sign the order that we at Brown & Wood prepared for execution consistent with our civic responsibility as demonstrated throughout this trial. The order that was prepared is a verbatim recitation of the language that was contained in your opinion and order dated August 4, 1986, and was submitted about ten days after the order was served on us, and was noticed for presentation to your Honor in late August. At that time your clerk kindly called us and informed us that you were on vacation and asked if we wanted to present it to a Part 1 judge. We determined that would be inappropriate in this situation and deferred until your return from vacation.

Alternatively, I would ask that you enter a judgment respecting Brown & Wood's relief which is unrelated to the reallocation of fees among the various other defendants. Brown & Wood has a judgment against Messrs. Pavelic and LeFlore under Section 1927 of the judiciary code, and that is wholly unrelated to the issue of the general attorneys' fees award involved with the other defendants. And we would ask that we have the right to proceed with our rights to collect on that judgment at the earliest possible opportunity.

Thank you your Honor.

THE COURT: I'll be pleased to hear you in the (p. 18) same order as to how you feel with respect to the relief that each has requested.

MR. LeFLORE: If your Honor please, the matters pending before you emanate from your opinion and order assessing in excess of \$200,000 in reimbursable

legal fees under Rule 11 of the Federal Rules of Civil Procedure following a six-week jury trial, denials of directed verdicts at the close of the plaintiff's case and the submission by your Honor to a jury which deliberated for two days on the issues before it. Needless to say, your Honor, and with all due regard for your Honor, this is a matter which will be promptly appealed to the Second Circuit.

Second, Mr. Pavelic has mentioned something about disarray of the firm's affairs. There is no such disarray to my knowledge regarding the client's matters being handled by me in the office at this time.

Third, the discussion here regarding the Special Master strikes me as somewhat bizarre as it is an effort to assess costs against Mr. Calloway who is aware of my appearance and argument today on these matters. Bizarre because the sole reason for the appointment of the Special Master to supervise discussion was the unprofessional conduct on one of defendant's counsel who in the course of discovery became so obstreperous, your Honor, you ordered a (p. 19) Special Master.

I don't think there is anything further that need be said nor addressed to the Court on my behalf or Mr. Calloway's at this time.

Thank you, your Honor.

MR. PAVELIC: Your Honor, this is also a court of equity. It is my view, and the view of the firm of Pavelic & LeFlore, which I seek to represent for this hearing, that the sanctions imposed under the Rule 11 and Section 1927 are not appropriate. And to the extent that they are, in

the interest of equity, ought to be reduced to a palatable economic figure in light of the fact that Pavelic & LeFlore was a firm of four attorneys and in practice less than two years together.

It is a direct, I believe, violation of the due process and equal protection clauses for us to be required to post a bond. And I believe under the circumstances of the financial affairs of the firm, bonding a judgment of \$23,000 I do not believe could be accomplished except through the posting of cash plus interest and whatever else would be required.

I have filed a notice of appeal on behalf of Pavelic & LeFlore on September 3. In addition to requesting a stay, I would request the Court to reduce the bond to a palatable amount. I cite the Court to the (p. 20) decisions of the Second Circuit in the Pennzoil-Texaco case.

In addition to that, your Honor, I believe that the award of the \$23,000 in the 1927 Section sanction is wholly incorrect as this is an agreement which was freely entered into between counsel after negotiations and should be, in any event, eliminated in all regards.

I also request the Court's consideration of the facts of the amended rule and the requirements of this circuit for individual attorneys to conduct a reasonable inquiry into the viability of a pleading before it is signed. As I have stated in the papers submitted on behalf of Pavelic & LeFlore, the allegedly violative conduct by counsel occurred significantly before the formation of the firm of Pavelic & LeFlore and should not be assessed against the firm.

I cite your Honor to a number of cases, including Northern Trust Company v. Miller, and Illinois 1985 case, which states that Rule 11 by its terms applies only to the signer of the offending documents.

Your Honor, Rule 11 sanctions are akin to criminal penalties. To the extent that they ought to be imposed at all, and I do not believe that they ought to be imposed at all in this matter, they must be imposed against individuals.

I also request that the Court rule with regard (p. 21) to Mr. LeFlore's request for relief pursuant to a letter served on the Court a couple of days ago in which Mr. LeFlore purports to say that Mr. Pavelic does not have any right to represent the interest of Pavelic & LeFlore. I don't think that's correct and I request the Court to rule on whether or not I, as a former partner of a now-dissolved firm, have the right to represent the interests of a firm which I believe are clearly in opposition to the interests of Mr. LeFlore personally.

MR. SCHARF: Your Honor, concerning the matter of allocation as among the defendants, I wanted to point out that Mr. Arnoff I believe rightly has made reference to the disbursements that Mr. Shukat, his client, incurred, and to request that your Honor include all such disbursements expended by any of the defendants who are sharing in that award, in the calculation.

Secondly, I am not happy, but I must, because our respective clients' positions are a little bit different, take small issue with Mr. Brookman in relation to the question of the Special Master's fees.

THE COURT: And Mr. Slotnik.

But there is no distinction.

MR. SCHARF: I seem to recall that Mr. Brookman did make use of some of the materials that developed out of that discovery and also participated in it unlike Mr. (p. 22) Slotnik. That issue, as Mr. McKay points out in one of his affidavits, is not mooted, certainly limited by the resolution your Honor will make on the question of taxability of the Special Master's fees.

And as to that, your Honor, I hesitated to say this in my papers and did not realize we'd be on the record, but now I think I should say that at the point at which, your Honor, Marvel voluntarily picked up a larger share of the Special Master's fees which was before the conclusion of discovery, I do recall, your Honor, in off-the-record conversation that it was the assumption of us all that ultimately those fees would be taxed to the losing party. And we knew who that would be, your Honor.

Also, your Honor, I heard Mr. LeFlore make reference to unprofessional conduct on the part of another attorney sitting at this table. I was there. I know to whom that kind of -

THE COURT: Let's not do the ashtray again. As to whether it was flung, whatever, no ashtray.

MR. SCHARF: I was about to say that if those charges are to be directed, they should be directed elsewhere. But more important, it was obviously necessary, as your Honor recognized on the argument of that application, given the wastefulness of what was happening in discovery, that there be a Special Master. His costs (p. 23)

generally are to be taxed to the losing party. He played a very constructive role in this case. There is no sound reason why, as Mr. Arnoff both here today and in his letter has pointed out, why those fees should not be taxed to Mr. Calloway.

I want to make several points concerning Mr. Pavelic's statement. First, I have a copy here of the decision he identified in his letter of yesterday, the Northern Trust decision. If your Honor is going to entertain that issue at all seriously, and I don't believe it is necessary for a reason that I will get to, we will have to ask your Honor to give us leave to submit a further brief on the issue. We were certainly served only yesterday with Mr. Pavelic's papers. Effectively, they arrived the morning after the day they should have been there. This letter arrived after hours last night.

The Northern Trust decision doesn't say what Mr. Pavelic just stated, it acknowledges a question whether under the realities of law firm practice any room exists for reading Rule 11 more expansively than its individualized language so as to extend liability to the firm.

It also in other portions of the opinion, which I needn't burden with your Honor reading, it makes clear the rather jaundiced view of the judge writing this opinion (p. 24) as to the merit of that kind of an argument, particularly in the kind of a small firm that we're talking about, particularly, your Honor, because the point is entirely misplaced, for two reasons: One, because Mr. Pavelic was no innocent bystander here.

I have been in the case since August of 1985. But I'm told by those who preceded me that Mr. Pavelic affirmatively and individually participated in many of the proceedings in this case at all steps along the way. I know he participated in trial and pretrial proceedings, too, because he did so in my presence. Beyond that, concerning his assumption that if there is no liability on the part of himself or the other partners, if any, in that firm, if there is no such liability under Rule 11, then he has no such liability. I think that such an argument overlooks something very basic, namely, that the essential issue is governed by the partnership law of the State of New York, which I do believe, your Honor, says otherwise and which I do not believe, your Honor, is amended in any respect by Rule 11 of the Federal Rules of Civil Procedure.

Finally, your Honor, if you are at all inclined to give weight to the mere assertions as vague as they are as to the financial straits on the part of these gentlemen or anybody else who has responsibility for the amounts that your Honor will award by judgment, I suggest that some form (p. 25) of discovery, hopefully an economic form that will avoid still further legal fees, can be directed by your Honor.

MR. MC KAY: On the question of when judgment should be entered, I can understand there might be some need on their part for an extension of that time period. However, since there is a ten-day automatic stay after judgment is entered, my suggestion would be to enter judgment and if at the end of that ten-day period Mr. Pavelic comes forward and shows positive steps have been taken to try to get the ducks in a row or whatever

has to be done, I at that point would have no opposition to a further reasonable extension.

MR. ARNOFF: Hopefully I have said my last words to your Honor.

MR. SLOTNIK: In four years of this matter, I never lost my temper. With respect to a particular remark that Mr. Pavelic made, I would only call this to the Court's attention: In the time that he was associated in one way or another with Mr. LeFlore and visions of \$63 million verdicts, of sugar plumb fairies dancing in his head, I never once heard any plea of any kind. It is only now that it has come down the other way that suddenly I hear of this disassociation and split between the parties. There is no reason, your Honor, legally, morally or in terms of the equity of the case, to treat the two gentlemen (p. 26) at the front table any differently.

MR. BROOKMAN: My brother's recollection as to the use of Special Master's depositions or depositions taken before the Special Master is faulty. The depositions we used at trial was depositions taken prior to the commencement of the Special Master's participation.

As to the gentleman at the front table's plea about having to bond a judgment, bonding is certainly available other than by cash, if you have assets, etc. And if as they tried to bring forth, they have no assets, a judgment is not going to be collectible. So the judgment should be entered.

Perhaps I have no objection to giving them ten days or even several extra days if the Court would want to grant that. But judgment should be entered, your Honor.

MR. BRESLOW: It seems like an onerous burden to be the last one to speak in this case from the defendants' side. It is to end on a very mundane note. Yesterday I called to Mr. Pavelic's attention, Rule 3 J of the local rules of this Court regarding notices of motion for reargument. I apprised him at that time that it is ten days from entry of the order, and that passed long ago. His arguments regarding the incorrectness of the Court's determination in its August 4, 1986 order have long since passed.

(p. 27) I hope that at this time, your Honor, for no other reason you find that the motion for reargument, which Mr. Pavelic has persisted in is untimely and should be disregarded.

THE COURT: Thank you all.

I will ask that a judgment be submitted on notice, given the nature of this. It will be submitted by Wednesday. If there are any difficulties and anybody wishes to be heard, you can come back next Friday.

The disposition will be as follows:

- The judgment will be entered. Enforcement of the judgment will be stayed for 30 days in order to give the plaintiff and its counsel an opportunity to make arrangements either for a supersedeas in the appropriate forum or for discovery if the defendants accede to some kind of discovery in lieu of a supersedeas. And failing that, an opportunity to get a further stay from the Court of Appeals.

The judgment will be against the firm of Pavelic & LeFlore. This is a somewhat untidy matter. My best recollection, which may be wrong, is that there is no stipulation of substitution in this case. We sort of got into a representation by the firm after the matter had been initiated.

I would take it that if Mr. Pavelic or somebody (p. 28) else wants to pursue that further, I think it should be done perhaps by way of a motion under - it is really new evidence. It is certainly nothing that was ever considered during the case. I'm going on the assumption that the lawyers were the ones who filed the papers. But a Rule 60 application might be appropriate on that subject. It will be handled formally, obviously on papers, etc., if at all.

With respect to the billings and the proportionate amounts, everybody should - in particular Mr. Scharf's bills and Mr. Arnoff's bills should be increased by the amount of the actual bills. I haven't heard anybody dispute the numbers, it is just a question of making the calculation.

As far as the Special Master's fees are concerned, it is a difficult problem, was difficult at the time that the arrangement, at the time of the order of the appointment of the Special Master. It is hard to reconstruct it all.

There are certain things that are absolutely clear. Counsel, for good or bad reasons, it doesn't matter now, were unable to conduct the discovery in what one would have hoped was a normal fashion. There was difficulty in interpretation, in applying procedures, and there was a whole host of these things which required the appointment of the Special Master. I am not going to single out

now (p. 29) any counsel as being primarily responsible for that. That obviously leads to the conclusion that the fees should be shared among all counsel on a party basis - I trust you understand what I mean.

That leaves the question of Messrs. Klein and Peter Scott Shukat. It is true that they did not use the benefits of the discovery as such. But I feel that under all of the circumstances, they should be included as parties under the allocation of the Special Master's costs.

I also decline to assess the Special Master's costs as costs in the litigation for the reason that I've indicated. They're not normal costs and they resulted really from the difficulties and from the contentions that were presented - and the difficulties that counsel have. The argument made by Klein and Scott Shukat is that they did not employ the discovery which was conducted by the Special Master in any way. And yet I cannot separate out now the benefits of that discovery. It's clear that that discovery benefited all of the defendants in resolving the case. And so I think it is appropriate, even if they didn't actually introduce it, I think it should be split. I would have the judgment so reflect that.

As far as the liability of the law firm and the plaintiff, I do not believe it appropriate for it to be joint and several. I said what I meant and I meant what I (p. 30) said. There will be no special allocation for the expert witness fees incurred on behalf of Peter Shukat, but I believe that the interpretation given either by me or the - I guess by me, of the treatment of the deposition transcripts, was in error. The cost of the transcripts, for any

transcript which was used, are appropriately taxable as normal costs.

The judgment will include the requested relief by Brown & Wood, their separate relief. And unless I'm wrong, that resolves the matters that you have brought to my attention.

MR. ARNOFF: Not completely.

THE COURT: What's missing?

MR. ARNOFF: I had addressed the issue of in view of the fact that the aggregate billing was 900,000, some form of security.

THE COURT: This judgment will be handled no different from any other.

(Court adjourned)

PETITIONER'S BRIEF

(4)
No. 88-791

Supreme Court, U.S.

FILED

APR 14 1989

JOSEPH E. SPANIO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

PAVELIC & LEFLORE (now dissolved),

Petitioner,

v.

THE MARVEL ENTERTAINMENT GROUP, a division of
CADENCE INDUSTRIES CORPORATION, JAMES
GALTON, AL BRODAX, MICHAEL S. KLEIN, THE
SHUKAT COMPANY, LTD., SCOTT SHUKAT and
PETER S. SHUKAT, ESQ.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR PETITIONER

JACOB LAUFER*
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80 PP

QUESTION PRESENTED

Does Rule 11, Fed.R.Civ.P., permit the imposition of sanctions only against the individual attorney who signs a paper or may the signer's law firm also be sanctioned?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-71a) is reported at 854 F.2d 1452. The opinion of the district court (Pet. App. B, pp. 72a-142a) is reported at 111 F.R.D. 637. The opinion of the district court on petitioner's motion under Rule 60(b), Fed.R.Civ.P. (Pet. App. C, pp. 143a-159a), is reported at 650 F.Supp. 684.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1988. The petition for a writ of certiorari was filed on November 10, 1988. That petition was granted on February 21, 1989. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

STATUTE INVOLVED

Rule 11 of the Federal Rules of Civil Procedure provides:

Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity

that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT

In August, 1982 plaintiff Northern J. Calloway retained attorney Ray L. LeFlore ("LeFlore") to bring an action for, *inter alia*, copyright infringement, breach of fiduciary duty and fraud against Calloway's business partners, his theatrical agent, his former attorney, and others. Calloway sought \$11 million in compensatory damages and substantial punitive damages. The core federal issue was whether or not the defendants had

infringed Calloway's copyright in a script for a proposed movie.

The original complaint (A., p. 8), signed and filed by LeFlore during December 1982, was dismissed on a technical ground. That complaint had included as exhibits copies of agreements bearing Calloway's signature, the authenticity of which was not then disputed. An amended complaint (A., p. 33), also signed by LeFlore, was filed on August 1, 1983. The amended complaint alleged that the agreements that were exhibits to the original complaint contained facsimiles of Calloway's signature that had been improperly affixed by a defendant ("the facsimile claim"). This facsimile claim was successfully invoked by Calloway to defeat a March 1984 motion for summary judgment, but was abandoned shortly before trial and replaced by two new claims.

The case was tried before a jury during April and May 1986. The jury found against Calloway on each of his claims.

On August 1, 1986, the district court ruled that Rule 11 sanctions were appropriate as to the facsimile claim (Pet. App. B). The district court imposed Rule 11 sanctions in the amount of \$100,000 against Pavelic & LeFlore (a firm that was formed by LeFlore and Radovan Pavelic during October 1984) on the ground that the facsimile claim was factually unfounded. The court imposed a further sanction of \$100,000 against the plaintiff, Northern J. Calloway.¹

¹ The court also awarded a total of \$10,000 in attorneys' fees to defendants Peter and Scott Shukat, under 17 U.S.C. §505 (Pet. App. B, pp. 118a-121a, 136a).

The specific documents found to have been signed in violation of Rule 11 were the amended complaint (A., p. 33), a memorandum of law in opposition to defendants' motion to dismiss, the memorandum of law (A., p. 72), reply memorandum (A., p. 81), and Calloway affidavit (A., p. 58) submitted in opposition to defendants' motion for summary judgment, and a proposed pre-trial order (A., p. 110), submitted March 25, 1986 (Pet. App. A, pp. 37a-39a). Only the proposed pre-trial order, (and interrogatory responses), had been signed during the life of the Pavelic & LeFlore partnership.²

Two weeks later, the firm of Pavelic & LeFlore was dissolved by Pavelic. Pavelic & LeFlore was during most of its existence a firm of two partners – Radovan Pavelic, a corporate lawyer, and Ray L. LeFlore, a litigator.

Petitioner moved under Fed.R.Civ.P. 60(b) to relieve the firm of the sanctions.

The district court found that the individuals who signed papers in violation of Rule 11 were LeFlore and Calloway. Radovan Pavelic, the other partner of Pavelic & LeFlore, who was not a litigator, had "signed none of the papers in this action until post-trial [Rule 11] motions were made." (Pet. App. C, p. 146a).

² Sanctions in the amount of \$23,000 were also imposed against Pavelic & LeFlore under 28 U.S.C. §1927 for failing to accept an offer of settlement from the defendant Luis Quiros made in February 1986 (Pet. App. B, p. 136a). These sanctions were reversed by the court of appeals (Pet. App. A, 67a-71a). The district court had declined to award further fees under 28 U.S.C. § 1927 (Pet. App. B, pp. 121a-124a).

The district court granted the motion in part and relieved the firm of one-half of the sanctions because the firm had existed only since October 1984, the approximate midpoint in the litigation. (Pet. App. C, pp. 154a-156a). The district court thus sustained \$50,000 in Rule 11 sanctions against the law firm, and the remaining \$50,000 were imposed against LeFlore alone.

Petitioner appealed the district court's imposition of sanctions against Pavelic & LeFlore on the ground that the offending documents had been written and signed by LeFlore.³ Accordingly, petitioner contended, Rule 11 permitted sanctions only against LeFlore, and not against the law firm.

Rejecting petitioner's interpretation of Rule 11, the court affirmed the district court's imposition of \$50,000 in sanctions against Pavelic & LeFlore. It held that Rule 11 sanctions should generally be imposed on a signer's law firm as well as on the individual signing the offending paper (Pet. App. A, p. 64a).

In reaching this holding, the court reasoned that a broadening of the class of persons subject to Rule 11 sanctions would enhance its goal of deterring improper litigation practices (Pet. App. A., pp. 63a-64a).

The court of appeals also considered that an additional \$100,000 in sanctions that had been imposed upon

³ In several instances, LeFlore had signed these documents long before the formation of Pavelic & LeFlore and while he was a member of a different firm, LeFlore & Egan (See, e.g., A., p. 32).

Calloway might more appropriately be redirected against counsel, *i.e.*, LeFlore and Pavelic & LeFlore. It remanded to the district court to consider whether or not to reallocate all, or a portion, of the additional \$100,000 to counsel.

SUMMARY OF ARGUMENT

A. This Court has repeatedly held that the plain meaning of a statute must control its interpretation, absent a clearly expressed legislative intent to the contrary, *e.g.*, *North Dakota v. United States*, 460 U.S. 300, 312 (1983). This principle applies with equal force to interpretation of the Federal Rules of Civil Procedure. *The Bank of Nova Scotia v. United States*, 487 U.S. ___, 101 L.Ed.2d 228, 237, 108 S.Ct. 2369 (1988).

B. The plain language of Rule 11, Fed.R.Civ.P., requires that every litigation paper be signed by "at least one attorney of record in the attorney's individual name, . . ." or by any *pro se* party. The signature is a certification that the Rule's duties of investigation have been met, and that the paper is "not interposed for any improper purpose, . . ." The Rule provides that for a violation of the signer's implied certification, the court "shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . ." Thus, the plain language and meaning of the Rule authorize imposition of a sanction only upon the attorney who signed a paper; they cannot support the court of appeals' interpretation that the court should presumptively impose a sanction upon the signer's law firm.

C. 1. The legislative history of Rule 11 is consistent with its plain language. The focus of the Rule, as it was promulgated in 1938, was solely upon the signing attorney, both in terms of the attorney's signature "in his individual name, . . ." and in its direction that in the event of "a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action." This narrow focus upon the signing attorney was emphasized in an article by Professor Edson Sunderland, a member of the Advisory Committee that drafted the rule, and by Dean Charles E. Clark, the Advisory Committee's Reporter, at an Institute on the Federal Rules of Civil Procedure. This focus was noted, as well, in the early decision in *United States ex rel. Foster Wheeler Corp. v. American Surety Co. of N.Y.*, 25 F. Supp. 225 (1938).

2. When the Rule was amended in 1983, it retained its exclusive focus upon the attorney who signed a paper. The purpose of the amendment was to "reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions." Advisory Committee Notes to Rule 11 at 391 (West supp. 1988) (citation omitted). The Rule did not, however, expand the class of attorneys who could be sanctioned beyond those who had signed a paper. In sharp contrast, the Rule did create one - and only one - class of persons who could be sanctioned notwithstanding they had not signed a paper, to wit: "a represented party." Moreover, a memorandum from the Chairman and the Reporter of the Advisory Committee to its members rejected a suggestion that sanctions be imposed upon a senior attorney in a case

where a junior attorney has signed the offending document. This memorandum clearly demonstrates that the interpretation of the court below, which would presumptively require imposition of sanctions upon entire law firms, is not in accordance with the Advisory Committee's intent.

D. The judicial amendment of Rule 11 by the lower courts in this case is not necessary to attainment of its purposes. Over 1,000 cases have already been reported in which sanctions have been considered, compared with only twenty such decisions during the period 1938-79. Courts have drawn upon a panoply of available remedies, including admonishment, compelled continuing education, imposition of reasonable attorney's fees, fines and suspension of attorneys from practice before them. They are amply authorized by the Rule, as now written, "to tailor sanctions to the particular facts of the case" Advisory Committee Notes, *supra*, at 391.

E. The court of appeals' interpretation does such violence to both the Rule and the rulemakers' intent, as revealed in legislative history, as to amount to an assumption of the legislative function. The court of appeals bottomed its interpretation upon the Advisory Committee's statement that it wished to "build[] upon and expand[]" the existing equitable doctrines for awarding sanctions." (Pet. App. A, p.64a) (citation omitted). It concluded that an expansion of the category of attorneys who can be sanctioned would promote the Rule's goal of deterring abusive pleadings. *Id.* However, this Court has recognized that such decisions are legislative in nature, and that " . . . it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers

the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (*per curiam*) (emphasis in original). The by-products of the lower court's expansion of the Rule include (a) an apparent conflict with the decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) which required that a finding of bad faith precede the imposition of sanctions which are not founded in specific statutory authority; (b) an undermining of the signing attorney's personal and individual responsibility that is the fulcrum of the Rule and its requirement of individually tailored sanctions; and (c) an invitation to inconsistent Rule 11 decisions, in different jurisdictions, as federal courts become captive to the varying states' laws regarding the vicarious responsibility of members of law firms and shareholders in professional corporations. Such an expansion of the Rule must abide the procedures contemplated by the rule-making provisions of 28 U.S.C. § 2072.

ARGUMENT

This case presents an important question of federal law: Does Rule 11, Fed.R.Civ.P., permit the imposition of sanctions only against the individual attorney who signs a paper or may the signer's law firm also be sanctioned. For the reasons set forth below, it is respectfully submitted that Rule 11 sanctions must be limited to the attorney who signs a paper.

I. The Plain Language and Meaning of a Rule Presumptively Control its Interpretation

As this Court has repeatedly observed, "the starting point in every case involving construction of a statute is the language itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (citations omitted); *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, reh. denied, 423 U.S. 884 (1975) (Powell, J., concurring).

The Federal Rules of Criminal and Civil Procedure, propounded pursuant to the authority granted this Court under 18 U.S.C. §687 (1946 ed.) (currently codified, as amended, at 18 U.S.C. §3771), and 28 U.S.C. §2072, respectively, are, "in every pertinent respect, as binding as any statute duly enacted by Congress and federal courts have no more discretion to disregard the Rule[s] mandate than they do to disregard constitutional or statutory provisions." *The Bank of Nova Scotia v. United States*, 487 U.S. ___, 101 L.Ed.2d 228, 237, 108 S.Ct. 2369 (1988) (addressing Rule 52, Fed.R.Crim.P.).

The plain meaning of a statute must control absent a clearly expressed legislative intention to the contrary. *North Dakota v. United States*, 460 U.S. 300, 312 (1983); *Garcia v. United States* 469 U.S. 70, 75 (1984) (when the terms of a statute are unambiguous, judicial inquiry is complete; " . . . only the most extraordinary showing of contrary intentions would justify a limitation on the 'plain meaning' of the statutory language"); see also, *Bourjaily v. United States*, 483 U.S. ___, 97 L.Ed.2d 144, 154-55, 107 S.Ct. 2775 (1987) ("It would be extraordinary to require legislative history to confirm the plain meaning of Rule 104 . . . we think that the Rule is sufficiently clear

that . . . the Rule prevails." (footnote omitted) (emphasis in original)); *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) (where "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.' " (citations omitted)); *Schiavone v. Fortune*, 477 U.S. 21, 30 (1986) (courts must follow "plain language" of Fed.R.Civ.P.15(c); "accept the Rule as meaning what it says").

II. The Plain Language of Rule 11 Restricts the Imposition of Sanctions to an Attorney Who Has Signed an Offending Paper

Rule 11 requires that every pleading, motion and other paper be signed by "at least one attorney of record in the attorney's individual name," or by any *pro se* party. The signer certifies to the court by his or her signature that the signer has read the paper, that on the basis of a reasonable inquiry the signer believes that the paper is well grounded in fact and supported by existing law or a good faith argument for a change in existing law, and that the paper is not being interposed for an improper purpose.

If a paper is signed in violation of its implied certification, Rule 11 mandates that "the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . ."

The class of persons who, by operation of the rule, make warranties to the court and who are subject to punishment for a breach of these warranties, is thus a finite one.

Significantly, Rule 11's sanctioning language does not provide for the imposition of sanctions upon attorneys who "advised"⁴, "permitted" or even "encouraged" the filing of an offending paper, or who employed the signer of such a document. Nor does it hold the signer's partners responsible for violations. To the contrary, the Rule's emphasis on individual professional responsibility is evident from its requirement that the paper be signed in the "attorney's individual name" and its frequent reference to the actual "signer"⁵ and the signer's personal certification as to his or her belief. The text of Rule 11 reasonably supports but one conclusion: that sanctions against attorneys are to fall solely on the shoulders of the individual signer. *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1132 (5th Cir. 1987); *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866, 875 n.13 (5th Cir. 1988) (en banc); cf. *In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987), cert. denied, 108 S.Ct. 1108 (1988).

Given Rule 11's straightforward authorization of sanctions only against an attorney who signed a paper, resort to legislative history is unnecessary, and arguably even inappropriate.

Nevertheless, as shown below, a review of the rule's legislative history reveals nothing inconsistent with its

⁴ Compare Fed.R.Civ.P.37(d), permitting sanctions against the "attorney advising" the party failing to comply with discovery demands.

⁵ Derivations of the words "sign" and "signer" appear in Rule 11 no fewer than seven times. "Unless otherwise defined, words [in a statute] will be interpreted as taking their ordinary, contemporary, common meaning . . ." *Diamond v. Chakrabarty*, supra, 447 U.S. at 308.

plain language, and indeed supports the interpretation we are urging upon the Court.

III. Legislative History Confirms the Restriction of the Rule's Sanctions to the Signer of an Offending Paper

A. The Rule, as Originally Promulgated in 1938, was Intended to Focus Sanctions upon the Signer of an Offending Pleading

Rule 11 was originally promulgated in 1938. The text of the original Rule 11 was as follows:

Rule 11. Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

The salient aspects of the rule as originally promulgated were its requirements that each pleading "be signed by at least one attorney of record in his individual name, . . ." whose signature was "a certificate by him that he ha[d] read the pleading; that to the best of his knowledge, information, and belief there [was] good ground to support it; and that it [was] not interposed for delay."

Most germane to the issue before this Court was the provision that "[f]or a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action."

Contemporaneous interpretations of the Rule recognized that its purpose was to hold to strict accountability the attorney of record who signed a pleading, *United States ex rel. Foster Wheeler Corp. v. American Surety Co. of N.Y.*, 25 F.Supp. 225 (E.D.N.Y. 1938); see also *Reynolds Metal Co. v. Metals Disintegrating Co., Inc.*, 8 F.R.D. 349, 353 (D.N.J. 1948), *aff'd*, 176 F.2d 90 (3d Cir. 1949).

In the words of a contemporary commentator:

"[i]f the courts themselves promulgate a specific rule on the subject in the form of the Federal Rule the result ought to be that the courts would feel a more serious obligation resting upon them to enforce the rules and attorneys might take more seriously their obligations on this subject."

Gavit, *The New Federal Rules and State Procedure*, 25 A.B.A.J. 367, 371 (1939).

Professor Edson R. Sunderland, a member of the Advisory Committee on Rules for Civil Procedure that

drafted the rules, expressed his understanding of the purpose and scope of the rule as follows:

No general requirement for the verification of pleadings is made by the federal rules. Sworn pleadings, as experience has shown, are no more likely to be true than unsworn pleadings. The federal rules have attempted to secure truthfulness in pleading by another means. This is the requirement that every pleading must have the personal signature of at least one lawyer who is retained in the case and this signature, by the express provision of the rules, constitutes a certification by him that he has read the pleading, that there is good ground to support it, and that it is not interposed for delay. For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. In view of the futility of ordinary verifications of pleadings, this plan of certificate of counsel seems at least worth trying.

Sunderland, *The Availability of the New Federal Rules for Use in the State Courts of Ohio*, 4 Ohio State L.J. 143, 146 (1938). See also, Browne, *Civil Rule 11: The Signature and Signature Block*, 9 Cap. U. L. Rev. 291, 301 (1979): ("The purpose of having the trial attorney personally sign the document is obvious. There need be a clear and unequivocal indication in the record that it is the trial attorney, and no other, who is certifying to the truth of the document, and the purpose for interposing it in the action.")

The Notes of the Advisory Committee on Rules to the 1938 version of Rule 11,⁶ are consistent with the language of the rule emphasizing personal certification:

⁶ The interpretation of federal rules by the Advisory Committee that formulated and recommended the rules is "... of weight." *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946); *Schiavone v. Fortune*, *supra*, 477 U.S. at 31.

This is substantially the content of former Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co. v. Martin*, L.R. 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) § 7455.

The invocation of the equity rule signature requirement⁷ was explained by Dean Charles E. Clark, the Advisory Committee's Reporter, at the Proceedings of the Institute on the Federal Rules of Civil Procedure at Washington, D.C., as quoted in *Freeman v. Kirby*, 27 F.R.D. 395, 399 n.3 (S.D.N.Y. 1961):

⁷ Equity Rule 24, 226 U.S. 655 (1912) had provided:

Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

Its predecessor, reported at 42 U.S. (1 How.) xlvii (1842), provided:

Every bill shall contain the signature of counsel annexed to in which shall be considered as an affirmation on his part that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

Rule 11 deals with signing of pleadings. Here we follow the equity rule that the signature of the lawyer, *carrying with it certain responsibilities, is much more important and worth while than an oath or verification attached to the complaint*. It is really an easy way of evading responsibility to draw a formal sounding document with long legal allegations and then get your client * * * to swear that they are all true. Then everybody has fulfilled his or her obligation. But after all, it doesn't amount to anything. In general the oath has been more defiled than honored by applying it to a situation of that kind. So here, instead of taking this course, we say that *the lawyer is held to these certain obligations* when he signs a pleading: "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Then certain penalties are stated, including disciplinary action against the attorney for violation of the rule. (emphasis supplied in text).

The Advisory Committee's reference to *Great Australian Gold Mining Co. v. Martin*, 5 Ch.Div. 1, 10 (1877) is to the same effect. That case, a decision of the Supreme Court of Judicature of England followed, in certain circumstances, the practice in the Court of Chancery where "[t]he signature of counsel to the bill was to that extent a voucher that the case was not a mere fiction." *Freeman v. Kirby*, *supra*, 27 F.R.D. at 397.

In sum, the language of the 1938 version of Rule 11 plainly invoked the professional fealty of the individual attorney who signed a pleading, and subjected that attorney to personal punishment for a wilful transgression. The Advisory Committee's notes, judicial decisions, and

the expressions of contemporary commentators (including the Reporter and a member of the Advisory Committee) confirm this understanding of the Rule.

B. The Rule, as Amended in 1983, Continued to Restrict Sanctions to the Signer of an Offending Paper

After some forty years of practice, it appeared that Rule 11 "ha[d] not been effective in deterring abuses." Advisory Committee Notes to 1983 Amendment of Rule 11 at 390 (West. supp. 1988) (citation omitted) (hereinafter "ACN-1983").

Research revealed that "between 1938 and 1976, Rule 11 motions had been filed in only nineteen reported cases. Among those cases, violations were found in only eleven instances, and attorneys sanctioned in only three . . . Through 1979, there was only one additional reported opinion in which a sanction was imposed pursuant to Rule 11. . . ." *Thomas v. Capital Sec. Services, Inc.*, *supra*, 836 F.2d at 876 n.14 (citations omitted); see generally Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn. L. Rev. 1, 34-37 (1976).

The ineffectiveness of the rule was ascribed to:

considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions.

ACN-1983 at 390 (citation omitted). The Committee explained the thrust of the new language as being to:

reduce the reluctance of courts to impose sanctions, see Moore, Federal Practice ¶7.05, at 1547, by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.

Id. at 391.

To attack the problem, the Rule was amended to require an objectively reasonable pre-filing factual and legal inquiry, and the attorney's certification that the paper being signed was "not interposed for any improper purpose . . ." This standard of conduct was intended to be "more focused." *Id.*

The new language inserted the word "sanctions" in the caption of the rule to emphasize "a deterrent orientation in dealing with improper pleadings, motions and papers . . ." and made the imposition of sanctions a mandatory judicial response to a violation. *Id.*

The Committee noted, with respect to the imposition of sanctions, that the trial court was to be vested with considerable flexibility and "discretion to tailor sanctions to the particular facts of the case. . . ." *Id.* It further observed that "in considering the nature and severity of the sanctions to be imposed, the court should take account of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed." *Id.*

Although the Advisory Committee "sought to increase the willingness of courts to impose sanctions," *id.*, it did not take the opportunity to expand the class of attorneys against whom sanctions could be imposed from signers to their firms.

In fact, the Rule, as amended in 1983, makes specific reference to one, and only one, person (or entity) who has not signed but who can nonetheless be sanctioned, to wit: "a represented party."

Significantly, if, as the court below apparently found, the drafters had intended that agency principles impliedly expand the category of persons subject to sanctions, there would have been no need explicitly to add clients (the lawyers' principals) to the class of sanctionable persons.

By explicitly including the sanctioning of non-signing clients, and omitting reference to sanctions against non-signing partners or law firms, the drafters apparently made a policy judgment of a legislative nature that should not and indeed cannot, be judicially altered by a court in the course of adjudicating a case.⁸

Indeed, although the Advisory Committee considered the 1983 amendment itself an expansion of the equitable doctrines for awarding sanctions, *see* ACN-1983 at 391, it specifically noted that amended Rule 11 "continues to apply to *anyone who signs* a pleading, motion or other paper," and advised that "[t]he court is expected to avoid using the wisdom of hindsight and should test the signer's conduct" *Id.* (emphasis added).

⁸ *Cf.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," quoting, *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *Rodriguez v. United States*, *supra*, 480 U.S. at 526.

The "vicarious liability" issue before this Court was actually considered and rejected during the process of drafting the proposed rule. As Judge Mansfield and Professor Miller wrote to the Members of the Advisory Committee on Federal Rules:⁹

One person suggests that the certification provisions be changed to provide that where a junior or associate attorney signs documents in violation of the rule the senior in charge rather than the junior should be held responsible. This "passing of the buck" would have the effect of overlooking misrepresentations or negligence by the juniors rather than promoting responsibility on the part of the seniors. A senior should sign if he is responsible. If not, the junior should exercise the care demanded by the rule. Otherwise each might feel he could avoid responsibility by blaming the other. (AA 15)

From this observation, which would be insensible if entire law firms were to have been held to account, it is obvious that the Advisory Committee intended, consistently with the Rule's language, to limit such sanctions to the attorney who signs a paper.

⁹ The excerpt is from the December 21, 1981 memorandum from Judge Walter R. Mansfield and Professor Arthur R. Miller, Chairman and Reporter, respectively, of the Advisory Committee on Civil Rules to the Members of the Advisory Committee on Federal Civil Rules. This memorandum is filed in the National Archives, Washington, D.C. The memorandum is not part of the record in this case; accordingly, it is reproduced as an Additional Appendix ("AA") immediately following this brief. *Cf.*, R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, §12.6, p.528 (6th ed. 1986).

IV. The Expansion Wrought by the Court of Appeals' Interpretation is not Necessary to Attainment of the Rule's Purposes

It is by now universally understood that the 1938 version of Rule 11 was not effective in accomplishing its goal. However, since its amendment in 1983, the Rule has provoked considerable attention. By 1988 more than 1,000 decisions had been reported in which Rule 11 was invoked. See American Bar Ass'n, Section of Litigation, *Standards and Guidelines For Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 104 (1988).¹⁰

In compliance with the Rule's continued focus upon the signer's knowledge and conduct, lower courts, post-1983, have directed their analyses of violations and appropriate sanctions at the factors affecting the responsible individual attorney's conduct and circumstances.

At one end of the spectrum, a district court has required that the offending attorneys attend a continuing legal education program in the expectation that "[p]erhaps some appreciation of precise pleading will rub off on them, if they have not already gotten the point." *Stevens v. City of Brockton*, 676 F.Supp. 26 (D. Mass. 1987).

¹⁰ The volume of such decisions seems to be burgeoning in geometric fashion. Between August 1, 1983 and August 1, 1985 there were more than 200 reported cases involving sanctions under Rule 11. *Thomas v. Capital Sec. Services, Inc. supra*, 836 F.2d at 876 n.14. By July, 1987, the count of post-1983 amendment reported decisions that analyzed Rule 11 was recorded at 564. See American Bar Ass'n, Section of Litigation, *Sanctions: Rule 11 and Other Powers* 1 (2d ed. 1988).

In other circumstances not involving intentional wrongdoing, lower courts have invoked as sanctions "the public admonishment of [the] opinion," *In re Disciplinary Action Curl*, 803 F.2d 1004, 1007 (9th Cir. 1986), see *In re Kelly*, 808 F.2d 549, 552 (7th Cir. 1986).

At the far end of the spectrum, in more egregious circumstances involving possible violations of ethical precepts, the courts have, in addition to other sanctions, made formal referrals to state grievance committees, see *Steinle v. Warren*, 765 F.2d 95, 101-02 (7th Cir. 1985), and suspended attorneys from practice before them. See *Donaldson v. Clark*, 819 F.2d 1551, 1557 n.7 (11th Cir. 1987) (en banc); *In re Disciplinary Action Curl, supra*, 803 F.2d at 1005.

In practice, while fines payable to the Court have been imposed, see *Donaldson v. Clark, supra*, the most common sanction is that explicitly stated in the rule, i.e., attorney's fees, see *Gagliardi v. McWilliams*, 834 F.2d 81, 82 (3d Cir. 1987). Such awards have ranged from the nominal, e.g., *Brown v. Nationwide Mut. Ins. Co.*, 805 F.2d 1242, 1244 (5th Cir. 1986), to the dramatic, see *Unioil v. E.F. Hutton & Co.*, 809 F.2d 548, 557-59 (9th Cir. 1986), cert. denied, 108 S.Ct. 83 (1987).

Thus, given Rule 11's present arsenal of sanctions, there does not appear to be a need for the draconian measure summoned by the court of appeals in support of its purpose.

V. The Court of Appeals' Interpretation of Rule 11 is an Insupportable Exercise of a Legislative Function

The lower court's expansion of the universe of individuals and entities subject to Rule 11 sanctions is an unwarranted interjection of "additional considerations of 'policy' . . ." see *Rodriguez v. United States*, *supra*, 480 U.S. at 526, one which, as the Rule's language and legislative history demonstrate, contravenes a conscious policy choice by its drafters.

The court of appeals' interpretation finds no support in the language or history of the Rule. Instead, it is constructed upon the sand of the Advisory Committee's stated general purpose of deterring abusive and dilatory practices by building upon and expanding the existing equitable doctrines for awarding sanctions. (Pet. App. A, pp. 63a-64a).

The court of appeals' view that "[f]irm responsibility for Rule 11 sanctions will create strong incentives for internal monitoring, and greater monitoring will result in improved pre-filing inquiries and fewer baseless claims" (Pet. App. A, p. 64a) may or may not be correct. But that is beside the point. Evaluation of competing policies in connection with prospective procedural rules is the function of the Advisory Committee, of this Court and of the Congress.¹¹

¹¹ "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice - and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, *supra*, 480 U.S. at 526 (emphasis in original).

Moreover, as shown above, Rule 11 in its present configuration affords the courts ample discretion to cope with and deter abuse.

The legislation inherent in the court of appeals' interpretation represents a major shift in the calculus of the Rule. It is, effectively, a repudiation of the Rule's precise directive, for over 50 years, that an individual attorney be responsible to the court for the presentation of facts and law. Ironically, the blurring of such responsibility provided the impetus for the original rule, as was explained by Professor Sunderland.

Insupportable under Rule 11, the court of appeals' interpretation is revealed as an exercise of inherent judicial power to sanction the petitioner in our case. Yet, the exercise of inherent powers may not contravene the intended application of a federal rule. *The Bank of Nova Scotia v. United States*, *supra*, 487 U.S. at ___, 101 L.Ed.2d at 237.

Moreover, the imposition of sanctions upon petitioner is inconsistent with the requirement that sanctions against counsel not founded in specific statutory authority must be preceded by "a specific finding as to whether counsel's conduct . . . constituted or was tantamount to bad faith. . . ." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980).

Finally, the imposition of sanctions in this case ignores the reality that it was LeFlore, not petitioner, who appeared as attorney of record for the plaintiff, see General Rules of the United States District Courts for the Southern and Eastern Districts of New York, Rule 3(c) ("An attorney who has appeared as attorney of record for

a party may be relieved or displaced only by order of the court . . . ").

◦ In the end, a Rule 11 sanction is a personal one. It gauges a signing attorney's efforts, knowledge and intent. The remedy is a flexible one, to be carefully tailored to the facts of the case. *See generally* American Bar Ass'n, Section of Litigation, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, *supra*, 121 F.R.D. at 125-26; G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* 216-34 (Michie 1989).

The court of appeals' creation of vicarious liability finds no support in the language, intent and operation of the Rule.

It threatens the uniformity of a national effort by making the Rule captive to state laws governing the vicarious liability of partners and shareholders of law firms. Moreover, it will burden the courts with satellite litigation, *see Robinson v. National Cash Register Co.*, *supra*, 808 F.2d at 1128-29.

A policy choice to impose Rule 11 sanctions upon lawyers who do not sign papers and (as in our case) who are not even litigators, must surely abide procedures contemplated by the rule-making provisions of 28 U.S.C. § 2072.

CONCLUSION

The judgment of the court of appeals, insofar as it affirmed the imposition of Rule 11 sanctions upon petitioner and remanded this case to the district court for

consideration of the imposition of further such sanctions against petitioner (see Pet. App. A, p. 71a), should be reversed.

Respectfully submitted

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April, 1989

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ADDITIONAL APPENDIX

**COMMITTEE ON RULES OF PRACTICE AND
PROCEDURE OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544**

CHAIRMEN OF ADVISORY COMMITTEES	
EDWARD TO. GIGNOUX	WALTER R. MANSFIELD
CHAIRMAN	CIVIL RULES
	WALTER E. HOFFMAN
	CRIMINAL RULES
JOSEPH F. SPANIOL, JR.	ROBERT A. AINSWORTH, JR.
SECRETARY	APPELLATE RULES
	RUGGERO J. ALDISERT
	BANKRUPTCY RULES

December 21, 1981

To: Members of the Advisory Committee on
Federal Civil Rules

cc: Hon. Edward T. Gignoux

Re: *Committee Meeting on Jan. 7-8, 1982*

In preparation for the above meeting I enclose a loose-leaf folder containing for each of our major proposed rule changes (Rule 4, 45, 7, 11, 16, 26, 52 and 67):

(1) An analysis by Prof. Miller and myself of the comments received with respect to the rule;

(2) Any suggested changes in our draft rule and in our Advisory Committee Note that seemed advisable to Prof. Miller and myself in light of comments received with respect to it. For your convenience these have been incorporated in a cut-and-paste version of our Preliminary Draft which shows the suggested changes at appropriate intervals; and

(3) A digest of the substance of each of the comments (oral and written) received.

In view of the large volume of individual comments, reports and the oral statements at our Washington, DC, and Los Angeles hearings, all of which have been distributed, you may find it more convenient first to study the data enclosed herewith. If each Committee member does his homework, I am confident that we will make satisfactory progress at our meeting, *which is expected to last for two full days.*

Our tentative agenda is to take up each of the rules in the order indicated in the attached folder. We must submit to the Standing Rules Committee by mid-January our final recommended changes in Rules 4 and 45 so that it can take action at its scheduled January 28, 1981, meeting. Although the balance of our proposed changes need not be submitted to that Committee until late winter or early spring, it would greatly facilitate our work if we were able to reach agreement on substantially all of the proposals at our January meeting, which might enable us to distribute further drafts and reach a consensus without an additional meeting.

In short, the progress we make at our January 7-8 meeting depends on your doing the necessary advance preparation work, as I know you will.

A Merry Christmas and a Happy New Year to you all!

/s/ Walter R. Mansfield
[Walter R. Mansfield]

* * *

ADVISORY COMMITTEE ON CIVIL RULES

Analysis of Comments Re: Committee's Proposed Amendments to Rules 7 and 11

Written and oral comments have so far been received from 34 members of the bench and bar with respect to our Committee's proposed amendments to Rules 7 and 11. (The cut-off date for comments was November 16th.) These include the views of individual judges, professors, and lawyers, and of numerous bar associations, including the American Bar Association, American College of Trial Lawyers, National Council of U.S. Magistrates, Los Angeles County Bar Association, San Diego Bar Association (Federal Courts Committee), Illinois State Bar Association, Chicago Bar Association, Philadelphia Bar Association, Federal Bar Council, Federal Bar Association, Schroeder-Frank Ad Hoc Committee, Schreiber-Lovejoy Ad Hoc Committee, District of Columbia Corporation Counsel's Office, and the California State Bar Association.

The substantial majority (some 21) favor some changes in the certification and sanctions provisions of the two rules. (Those presently in Rule 11 are incorporated by reference in Rule 7.) However, only a few approve the Committee's proposals *in toto*. Most advance suggested modifications, some relatively minor, others drastic enough to amount to new concepts. Their principal proposed modifications, with my reactions, are discussed below. Those who gave reasons for favoring some changes in the certification provisions of the two rules indicate that more precise and focused standards, including a duty of reasonable inquiry, would reduce frivolous or meritless claims, defenses, or motions by inducing

attorneys and pro se litigants to stop, think and investigate more carefully before serving and filing papers. For the same reasons, mandating imposition of sanctions, such as expenses and attorneys' fees, upon the violator is viewed as a healthy deterrent that will reduce costly meritless maneuvers and are worth the risk of breeding satellite litigation.

A small group of approximately 11 either oppose any changes in the certification provisions or would water the Committee's proposals down to the point where no substantial changes would be made. Some of these view any new certification as unnecessary, in the absence of hard evidence of widespread abuse, and a useless measure that will lead to excessive satellite litigation or be treated by lawyers and clients as a mere formality, ineffective in achieving the purpose of reducing frivolous claims, defenses or motions and in cutting waste and cost in litigation. Others take the view that the Committee's proposal will inhibit the lawyer from performing his or her function, invade the province of privileged communications with his or her client and require disclosure of confidential work product, and impeded access to the federal courts by favoring the affluent client who can make the necessary reasonable investigation and discriminate against the poor, who cannot. Some believe that the existing provisions of Rules 7 and 11 are adequate, if properly enforce, and that the new standards are unnecessary. Of these, approximately 6 either oppose altogether any change in sanctions provisions or would emasculate the Committee's proposals by changing mandatory sanctions to permissive, requiring proof of willfulness, mandating a hearing in every sanctions proceeding, or relying

entirely on Rule 37(a)(4) which permits a party opposing a discovery order to avoid sanctions upon showing his position was substantially justified. Strengthening of sanctions is opposed on familiar grounds: they will lead to excessive, wasteful satellite or collateral proceedings; they will be abused by some judges; they are inconsistent with the permissive terms of Rule 16; they will become a "tool for case management"; they should be limited to truly egregious cases; they require an almost impossible determination to be made of good faith or subjective intent; they are too vague.

There follow descriptions of the principal changes suggested by various commentators, with our tentative reactions and recommendations:

(1) A few suggest that the certification standards should be changed to make them consistent with Rule 37(a)(4) and (b)(2), which provide that where a motion for an order compelling discovery is granted the court shall, after an opportunity for a hearing, require the party or attorney who forced the movant to seek an order to pay the movant's expenses and reasonable attorneys' fees unless the court finds that the opposition "was substantially justified or that other circumstances make an award of expenses unjust." The phrase is the same as that in the Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412, which awards fees and expenses to small businesses against which the government brings suits that are not "substantially justified." The "substantially justified" standard is also urged on the grounds that it makes the test an *objective* one, obviating the need for an inquiry into the subjective motives of the pleader or movant.

This group would substitute the words "it is substantially justified" for the words "there is good ground to support it" in Rule 7. The Advisory Committee Note (ACN) would then define "substantially justified" as including "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." The proponents of this change would apparently retain the "reasonable inquiry" requirement and the present draft Rule 7(b)'s language to the effect that the pleader or movant must certify that there is "good ground" to support it, and would place the burden on the movant or pleader to substantially justify his procedural motion.

One organization (L.A. Bar Assn.) favors a standard, to be incorporated in one rule applicable to all proceedings, including those under Rule 37(a), to the effect that "reasonable conduct [is] required of all attorneys and parties in connection with all aspects of any proceeding." The Note would then define the term to include the concepts now voiced in our proposed Rules 7(b)(3) and 11.

Our reaction to the foregoing is that adoption of the "reasonable conduct" language would be meaningless and confusing and that a more precise standard is required. For the same reason we believe that the "substantially justified" standard would, standing alone, be too vague a concept to be of any effect in reducing baseless or frivolous claims and be guilty of overbreadth as the basis for imposition of sanctions. Indeed the breadth of this term in Rule 37(a)(4) and (b)(2) may be one reason for the courts' reluctance to award realistic expenses thereunder. The term, as used in Rule 37(a)(4)

and (b)(2), converts what is apparently a mandatory sanction (imposition of expenses) into a permissive one. Although Rule 37 provides that the court "shall" require the party whose conduct necessitated the motion for a discovery order to pay the movant's reasonable expenses, including attorneys' fees, which sounds mandatory, it then weakens this power, turning it into a permissive one by adding "unless the court finds that the opposition to the motion" [37(a)(4)] or "the failure [to permit discovery, 37(b)(2)] was substantially justified or that other circumstances make an award of expenses unjust."

If, as we noted to do in approving our proposed amendments to Rules 7, 11 and 26(g) for submission to the bench and bar, we want to mandate imposition of expenses and sanctions as a deterrent to frivolous motions and pleadings, which increase cost and delay, the Rule 37 approach will not achieve this objective. Being in substance permissive, it would probably lead to the same judicial reluctance to impose sanctions as presently exists under Rule 37(a)(4) and (b)(2). However, there may be some advantage in attempting (cosmetically at least) to equate the "substantially justified" standard with the certification requirements we propose to adopt in Rules 7 and 11. Accordingly we suggest that the words "substantially justified" be included in this rule, as another element of the certification, even though it probably adds nothing new.

(2) A large number of those who commented urge that the certification standard of Rule 7 ("good ground to support it") should be the same as that in Rule 11 ("well grounded in fact . . . existing law"). This is advocated on the ground that it would avoid the confusion that may be

created by the presently proposed difference. Although our Committee took the view that the difference was justified because of the possibility that the Rule 11 standard would not be appropriate for certain motions (see our ACN), upon further reflection we think that even a motion to adjourn could be judged rationally according to our Rule 11 certification standard, and that the avoidance of the potential confusion by adopting parallel language would outweigh any benefit from the difference.

Accordingly, we recommend that the presently proposed Rule 11 standard, subject to such other changes as may be made (e.g., insertion of the phrase "substantially justified," deletion of the word "primarily", etc.) be inserted in Rule 7 instead of the "good ground to support it" standard.

A few people urge other certification standards or argue that the present standard is adequate. The American College of Trial Lawyers, for instance, takes the view that the "reasonable inquiry" requirement should be eliminated and the "good ground to support it" standard be retained for both rules, with the addition of the "primarily for an improper purpose . . ." language. It would require proof of intentional misconduct. It argues that the "reasonable inquiry" standard will chill a lawyers' enthusiasm, place impossible burdens on the court, and lead some lawyers, in order to avoid sanctions, to take positions in conflict with those of other clients.

We find no merit in these positions, which ignore the basic premise of our proposals, that the present good faith type certification requirements are being disregarded in practice, with many lawyers multiplying cost

and delay through interposition of frivolous or groundless pleadings or motions. A serious problem exists. The American College simply suggests that all is well and has no constructive suggestion to offer. While ours may come a cropper it may also succeed in deterring lawyers from violating the more specific certification requirements.

(3) Several suggest that if, as they urge, a single certification standard is adopted, it be stated once and then incorporated elsewhere by reference, rather than several times (Rules 7, 11, 26(g)) throughout the rules as the present proposals would do. Similarly, if a single sanctions rule is adopted, the same recommendation is made. The proponents argue that their proposal would avoid confusion and needless repetition.

With respect to the certification standards (as distinguished from provisions for sanctions), we adhere to the view that this is an instance where repetition will increase the effectiveness of the new standards, since the average practicing lawyer, who is not too familiar with the rules, is unlikely to do much cross-referencing. When he is preparing a motion he looks at the Motions Rules, not those dealing with pleadings, and vice versa. If he sees the requirements in plain print, he might be more careful than if they were elsewhere. Usually the practicing lawyer is not a professional specializing in federal procedure or a member of a bar association committee devoted to federal practice. Hence this is an instance where repetition is good for the soul. High and frequent visibility is essential to guard against sloth, ignorance or a tendency to treat the requirements as ritualistic formalities.

(4) Quite a few urge that the word "primarily" be stricken from Rules 7 and 11 on several grounds. First, they say it implies that improper motives might be acceptable as long as they are not the principal, dominant motive or purpose. Second, the word poses a difficult problem for trial lawyers who will have to determine not only whether there was an improper purpose but whether it was predominant, leading to waste of judicial resources, since primary intent is not easily identifiable or delay quantitative in nature. The Schroeder-Frank team adds that a Lexis search revealed no case where a court refused to impose sanctions because the improper purpose was not the primary one, notwithstanding Judge David Edelstein's article, upon which our ACN relies.

Upon further reflection we believe that "primarily" should be deleted, for the above reasons. However to protect against *any* delay or increase in cost always being found improper the language could be changed to read "it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Insertion of the words "unnecessary" and "needless," should assure (particularly if the words "substantially justified" are inserted earlier as recommended above) that reasonable delay and expense, where justified, would not violate the rule.

(5) *Sanctions*. A few urge that a distinction should be drawn between imposition of expenses, which are in the nature of restitution, and penalties for misconduct, which can be more appropriately described as "sanctions." They argue that separation of the two will allow courts, which are presently reluctant to embarrass or humiliate lawyers, willingly to impose expenses, which

do not impugn the lawyer's integrity, see Ellington, *A Study of Sanctions for Discovery Abuse*, Dept. of Justice, 1979, and limit other penalties to cases of truly egregious behavior.

It is also urged that instead of having the provisions for sanctions repeated in several different rules (Rules 7, 11, 26(g), 37) a new separate rule (tentatively Rule 87) be adopted which would set forth sanctions applicable to all pretrial proceedings.

A large number of commentators express concern over the risk that satellite or collateral hearings with respect to sanctions may become so wasteful of the time of parties and the judge that they will defeat the advantages gained from the more stringent certification requirements and the value of mandatory sanctions as a deterrent. However, no solutions are offered other than (1) to draw distinctions between "reimbursement" (expenses) and "sanctions" (penalties), (2) to retain permissive sanctions rather than adopt mandatory sanctions, (3) to provide that penalties may be imposed only for egregious misconduct. The American College of Trial Lawyers not only advocates retention of permissive sanctions but the insertion of an express statement that sanctions may be imposed only after a notice of hearing. Others suggest that it is inconsistent to have mandatory sanctions in proposed Rules 7, 11, and 26 while retaining permissive sanctions in Rules 16(f) and 37(a)(4) and (b)(2).

Most of these arguments were discussed in detail by our Committee members at meetings which resulted in the present draft. For reasons already stated we oppose

concentrating all of the sanctions provisions in one new rule, to which Rules 7, 11, 26, 37, etc., would be cross-referenced. Here again the proposal would dilute the deterrence value to be gained from repetition in those rules most likely to be consulted by the average practicing lawyer. Secondly, the standards for violation of Rule 26(g) differ in some respects from those in Rules 7 and 11. We long ago, after extensive debate, voted in favor of mandatory sanctions, expressing the view that there would be no need to hold a hearing in every case. There will be cases where the judge, having witnessed the proceedings and heard the parties throughout the trial, is fully familiar with all the material facts bearing on sanctions. Although, as a matter of due process, he should give the parties an opportunity to offer any new material evidence, a mandatory hearing would add nothing and be a waste.

However, we should consider rewriting the sanctions provisions of Rules 7, 11, and 26(g) to authorize the court to require a party to pay reasonable expenses, including attorneys' fees, upon showing that the certification provisions have been violated, but limit penalties to cases where willfulness is demonstrated. This would make the rules more consistent with Rule 37(a)(4) and (b)(2), protect against abuse by the court, encourage reluctant judges at least to assess expenses as less likely to embarrass counsel or impugn integrity than a straight-out penalty, and remove some of the chilling effect of the new certification requirements coupled with mandatory sanctions.

With the foregoing in mind we offer as an alternative a redrafted sanctions provision for Rules 7 and 11, which

provides that upon a violation of the certification requirements the court shall order the party signing the motion, other paper, or pleading, a represented party, or both, to pay the reasonable expenses of the other party, including a reasonable attorney's fee, and, upon finding that the violation was willful, any appropriate sanction. Its effect should be to take some, but not all, of the bite out of the mandatory sanctions provision.

(6) Several persons responding are afraid that enforcement of the new standards, particularly if lawyers are threatened with sanctions, may force them to disclose privileged communications or work product in order to demonstrate that their litigation maneuver was well grounded in fact and law, substantially justified and not taken for an improper purpose. These qualms are somewhat overstated. Indeed, the same risk is faced under Rules 7 and 11 as they now stand. Judges have usually been able to devise ways of protecting a party's rights without depriving him of the ability to show good cause for his action. This could be done by permitting the judge, in his discretion, to view or hear the privileged matter *in camera*. However, we suggest adding a statement to the ACN to the effect that the rule is not designed to weaken or destroy such privileges and that the judge may be expected, just as he is authorized to do by Rule 26(c), to enter such protective orders as are necessary when disclosure of privileged communications or data is necessary to justify the movant or pleader's action.

(7) One person (a chief clerk of a district) asks that clerks be relieved of the job of returning unsigned pleadings and motions which cannot be accepted for filing,

since this would increase the clerks' burdens and mailing cost. He suggests leaving the decision to the court. Several persons argue that unsigned papers should be accepted for filing subject to protest rather than be rejected, since rejection is too punitive. We disagree. Rejection would in my view serve a salutary purpose. As for the procedure to be followed regarding return of papers, this is a classic matter for local district court rule.

(8) One person urges that Rules 7 and 11 should add that where a *non-party* is involved (e.g., by motion to intervene) it should be bound by the certification requirements. However, this occurs so infrequently that a specific reference seems unnecessary. Another person argues that Rule 7 should impose the certification requirement on "responses." But the term "other paper" in Rule 7 is sufficiently broad to cover a "response."

(9) With respect to the sanctions provisions one person urges that the terms, at least with respect to an award of expenses, be changed to provide that such expenses shall be imposed unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust. However, there would be no violation if the noncompliance was justified. Also, in a hardship case the court could scale down the amount of allowable expenses.

(10) Two persons urge that the fourth sentence of Rule 11, beginning "The rule in equity . . . abolished" should be stricken as outdated and unnecessary. We favor saving this for another day unless there is no risk of controversy with respect to the proposal.

(11) One person suggests that the certification provisions be changed to provide that where a junior or associate attorney signs documents in violation of the rule the senior in charge rather than the junior should be held responsible. This "passing of the buck" would have the effect of overlooking misrepresentations or negligence by the juniors rather than promoting responsibility on the part of the seniors. A senior should sign if he is responsible. If not, the junior should exercise the care demanded by the rule. Otherwise each might feel he could avoid responsibility by blaming the other.

Conclusion

Our drafts of Rules 7 and 11 have not fared badly at all at the hands of bench, bar and public, and we believe that with a few changes they can be recommended to the Standing Committee.

W.R.M.

A.R.M.

12/21/81

[Comments on other rules omitted in printing]

RULES OF CIVIL PROCEDURE

Rule 7. Pleadings Allowed; Form of Motions and Other Papers; Sanctions

* * *

(b) MOTIONS AND OTHER PAPERS ; SANCTIONS.

* * *

(2) The Rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) Every motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the motion or other paper and state his address. The signature of an attorney or party constitutes a certificate by him that he has read the motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry there is good ground to support it; and that it is not interposed primarily for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. If a motion or other paper is not signed, it shall not be accepted for filing. If a motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred

because of the filing of the motion or other paper, including a reasonable attorney's fee.

* * *

Suggested alternative to above:

[RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS AND OTHER PAPERS; EXPENSES AND SANCTIONS

* * *

(b) MOTIONS AND OTHER PAPERS; EXPENSES AND SANCTIONS.

* * *

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) Every motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the motion or other paper and state his address. The signature of an attorney or party constitutes a certificate by him that he has read the motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is substantially justified and not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a motion or other

paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall order the person who signed it, a represented party, or both, to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion or other paper, including a reasonable attorney's fee, and, upon finding that the violation was willful, shall impose any appropriate sanction.]

ADVISORY COMMITTEE NOTE

One of the reasons sanctions against improper motion practice have been employed infrequently is the lack of clarity of Rule 7. That rule has stated only generally that the pleading requirements relating to captions, signing, and other matters of form also apply to motions and other papers. The amended rule makes the applicability of the signing requirement and the sanctions for its violation explicit. The new language is intended to reduce the reluctance of courts to impose sanctions. See Moore, *Federal Practice* ¶ 7.05, at 1547. Moreover, as is true of the certification requirements in Rule 11 and Rule 26(g), Rule 7(b)(3) emphasizes the responsibilities of the attorney and reinforces those obligations by the imposition of sanctions.

Even though the signing obligation of new Rule 7(b)(3) already is required by the combination of existing Rules 7(b)(2) and 11, a clear expression of the standard by which the signature on any motion or other paper will be judged has been deemed important enough to require independent statement in Rule 7. Merely referring to the

Rule 11 sanction provisions to highlight their applicability was thought to be insufficient; by describing the sanctions that may be imposed for non-compliance with the certification requirement, everyone's awareness of the rule should be increased and its policy of deterrence furthered.

Experience has shown the inefficacy of the language of Rule 11 in checking abuses in the signing of pleadings or the filing of motions. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith. See e.g., *Roadway Express, Inc. v. Piper*, ___ U.S. ___, 100 S.Ct. 2455 (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process.

The expanded nature of the lawyer's certification in the third sentence of new Rule 7(b)(3) recognizes that the litigation process may be abused for purposes other than delay. See, e.g., *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977). Moreover, the

new language changes the former requirement, which has been interpreted to apply only to a motion interposed solely for delay. See Edelstein, *The Ethics of Dilatory Motion Practice: Time for a Change*, 44 Fordham L.Rev. 1069 (1976). There is a violation of Rule 7(b)(3) when the primary motivation for the submission of a motion is unjustifiable delay. Thus, the rule applies even when there is some other objective for the motion, even a legitimate one.

[Suggest last 2 sentences above, "Moreover . . . legitimate one" be stricken and text below continue without paragraph.]

The amended rule provides a more focused standard of conduct than the original text. To satisfy the affirmative duty imposed by the rule a party must make some inquiry before submitting a motion or other signed paper. The standard is one of reasonableness under the circumstances. See *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F.Supp. 975 (E.D. Pa. 1973). This standard is more stringent than the original good-faith standard and thus it is expected that a greater range of circumstances will trigger its violation. See *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980).

[Suggest insertion of the following at this point:

Nor does the rule automatically require a party or an attorney to disclose privileged communications or work product in order to show that a motion is substantially justified. The provisions of Rule 26(c), including appropriate orders after in camera inspection by the court remain available to protect a party claiming privilege or work product protection.]

However, the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal

theories. The court must avoid using the wisdom of hindsight and should test the signer's conduct by inquiring into what was reasonable to believe at the time the motion was interposed. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the motion; or whether he depended on forwarding counsel or another member of the bar.

[Suggest that following be added without paragraph to above:

The requirement that the motion or other paper be substantially justified places upon the movant the same burden that must be met under Rule 37(a)(4) and (b)(2) in order to avoid imposition of reasonable expenses.]

Rule 7(b)(3) applies to anyone who signs the motion, although the standard is the same for unrepresented parties, who are obliged to sign themselves, the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations. See *Haines v. Kerner*, 404 U.S. 519 (1972).

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by mandating that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation. This corresponds to the approach in imposing sanctions for discovery abuses. See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (per curiam). And the words "shall impose" in the last sentence focuses the court's attention on the need to impose sanctions for

improper motion practices. The court, however, retains the necessary flexibility to deal appropriately with violations and has discretion to tailor sanctions to the particular facts of the case.

[Suggest last two sentences above be changed to read:

And the words "shall order" in the last sentence focus the court's attention on the need to impose upon the party who violates the rule the costs and expenses caused by the violation. In the case of a willful violation the court has the further obligation to tailor sanctions that are appropriate to the particular facts of the case.]

In considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the motion or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor.

[Suggest first line of above par. be changed to read, "In considering whether a violation is willful,"]

Courts currently appear to believe they may impose sanctions on their own motion. See *North American Trading Corp. v. Zale Corp.*, 73 F.R.D. 293 (S.D.N.Y. 1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's

responsibility for securing the system's effective operation.

[Suggest first line of above par. be changed to insert "expenses or" before "sanctions".]

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the paper, and the new rule so provides. Although Rules 7 and 11 have been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969); 2A Moore, *Federal Practice* ¶11.02, at 2104 n.8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

[Suggest changing first two lines of above paragraph to read:

If the duty imposed by the rule is violated, the court shall have the discretion, in imposing expenses or sanctions, to impose them on either the attorney, the party signing

Suggest inserting "expenses or" before "sanctions" in last line above.]

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose sanctions on the client. See *Browning Debenture Holders' Committee v. DASA Corp.*, *supra*. This modification brings Rule 7(b)(3) in line with

practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

[Suggest inserting "expenses or" before "sanctions" in lines 3 and 5 of above paragraph.]

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary, permitting the sanction question to be resolved at the time the motion is dealt with or shortly thereafter.

[Suggest inserting "expenses or" before "sanctions" in first line of above paragraph and striking "sanction" from eighth line.]

To assure that the efficiencies achieved through reducing abusive motion practice will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must limit the scope of a sanction proceeding. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

[Suggest inserting "expenses or" before the word "sanctions" in line 3 of above paragraph, and changing the words "sanction proceeding" to "proceeding for the imposition of expenses or sanctions."]

Although the encompassing reference to "other papers" in new Rule 7(b)(3) literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 7(b)(3).

A

Rule 11. Signing of Pleadings; Sanctions [6]

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief ~~there is good ground to support it, and that it is not interposed for delay~~ formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed primarily for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. If a pleading is not signed, it shall not be accepted for filing. ~~or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.~~ If a pleading is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or

both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

B

[Suggest that to conform our Rule 11 proposals to proposed rule 7 the caption above be amended to insert "EXPENSES AND" before "SANCTIONS" and that lines 9-29 be changed to read as follows:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief ~~there is good ground to support it, and that it is not interposed for delay~~ formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is substantially justified and not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading is not signed, it shall not be accepted for filing. If a pleading is signed in violation of this rule, the court, upon motion or upon its own initiative, shall order the person who signed it, a represented party, or both, to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee, and, upon finding that the violation was willful, shall impose any appropriate sanction.]

C

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Experience has shown the inefficacy of the rule's language in serving this function. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969). See also the amendment to rule 7, which the revision of Rule 11 parallels, and the Advisory Committee Note to rule 7(b)(3), much of which is repeated below.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, e.g., *Roadway Express, Inc. v. Piper*, ___ U.S. ___, 100 S.Ct. 2455 (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended rule 11 recognizes that the litigation process may be abused for purposes other than delay. See, e.g., *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977).

Because the former Rule 11 requirement that a pleading not be interposed for delay has been interpreted to mean *solely* for delay, its application was restricted. See Edelstein, *The Ethics of Dilatory Motion Practice: Time for a Change*, 44 Fordham L.Rev. 1069 (1979). The new language

changes that standard. There is a violation of Rule 11 when the *primary* motivation for the submission of any pleading is unjustifiable delay. Thus, the rule applies even when there is some other objective for the pleading, even a legitimate one.

[Suggest that the above paragraph be stricken, in view of the deletion of "primarily".]

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. See, e.g., *Heart Disease Research Foundation v. General Motors Corp.*, 15 Fed. R. Serv. 2d 1517, 1519 (S.D.N.Y. 1972). They have been replaced by a standard of conduct that is much more focused. The Rule 11 formulation is phrased somewhat differently from that in Rule 7 to reflect the different factors that are relevant to pleading and making a motion.

[Suggest that the last sentence of above paragraph, beginning "The Rule 11 formulation" be stricken, in view of proposal that identical standards be adopted, and that the sentence below, beginning "The new language" be continued as part of same paragraph.]

D

The new language stresses the need for some pre-filing inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F.Supp. 975 (E.D. Pa. 1973). This standard is more stringent than the original good-faith formula and thus it is expected that a

greater range of circumstances will trigger its violation. See *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980)

[Suggest adding following to above without paragraph:

The requirement that the pleading be substantially justified places upon the pleader the same burden that must be met under Rule 37(a)(4) and (b)(2) to avoid imposition of reasonable expenses for opposition to permissible discovery or refusal to obey a discovery order.]

However, the court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading; whether the pleading was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Amended Rule 11 continues to apply to anyone who signs the pleadings. Although the standard is the same for unrepresented parties, who are obliged to sign the pleadings themselves, the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations. See *Haines v. Kerner*, 404 U.S. 519 (1972).

[Suggest inserting the following at this point:

The rule does not automatically require a party or an attorney to disclose privileged communications or work product in order to show that a pleading is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.]

E

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Fed. R. Civ. P. 11*, 61 Minn.L.Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. See *Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The work "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleading. This corresponds to the

approach in imposing sanctions for discovery abuses. See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (per curiam). And the words "shall impose" in the last sentence focuses the court's attention on the need to impose sanctions for pleading abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

[Suggest changing "The word 'sanctions' " in line 3 above to "The words 'expenses and sanctions' " and changing "stresses" in line 4 to "stress".

Also suggest rewriting the last sentence above, beginning "And the words" to read as follows:

And the words "shall order" in the last sentence focus the court's attention on the need to impose upon the party who violates the rule the costs and expenses caused by the violation. In the case of a willful violation the court has the further obligation to tailor sanctions that are appropriate to the particular facts of the case.]

F

The reference in the former text to wilfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor.

[Suggest changing above paragraph by striking first sentence and amending the balance of lines 2-3 to read without separate paragraph:

In considering the nature and severity of any sanctions to be imposed, the court should take account]

The court's authority to impose sanctions on its own motion has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. See the Advisory Committee Note to Rule 7(b)(3).

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969); 2A Moore *Federal Practice* ¶ 11.02, at 2104 n.8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

[Suggest insertion of "expense or" before "sanctions" in line 2 and last line of above paragraph.]

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. See *Browning Debenture Holders' v. DASA Corp.*, *supra*. This modification brings Rule 11 in line with practice under

Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that the sanctions issue under Rule 11 normally

G

will be determined at the end of the litigation. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

[Suggest insertion of "expenses or" before "sanctions" in lines 1 and 3 above, and changing the words "sanctions issue" in line 4 above to "issue as to imposition of expenses or sanctions".]

To assure that the efficiencies achieved through more effective operation of the pleading regime will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must limit the scope of sanction proceedings. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

[Suggest changing "sanctions proceedings" in line 4 of above to "proceedings for the imposition of expenses or sanctions".]

• • •

[drafts of other proposed rules omitted in printing]

COMMENTS RE: RULE 11

SOURCE

COMMENTS

Judge Bagwell 7/15/81

Recommends that Rules 7(b)(3), 11, and 26(g) be combined as a single rule under Rule 11, since they are "essentially cousins." Also suggests deleting, as antiquated, the phrase "the rule in equity that averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished."

Prof. Gillers 7/7/81

Criticizes the use of the word "primarily" in the phrase "not interposed *primarily* for any improper purpose . . ." on the grounds that it is unnecessary and it implies that improper motives are acceptable so long as they are not primary. (See Gillers comment re: Rule 7 for fuller description).

Prof. Hazard, Jr. 7/14/81

Notes the different criteria governing the legitimacy of a motion, pleading, or discovery maneuver in Rules 7, 11, and 26(g)(1) and recommends a single, integrated formulation be stated in Rule 7, and referred to by incorporation in the other Rules as needed. (See Hazard comment re: Rule 7 for fuller description).

Judge Hoffman 7/7/81

Notes the difference between the mandatory nature of sanctions under Rule 11 and the discretionary nature under Rule 16. Recommends adding to Rule 11 the following language from Rule 16, that fees and expenses be imposed "unless

the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust." (Hoffman recommends similar addition to Rules 7 and 26(g)).

W. Morton, Esq. 8/17/81

Suggests deleting "not interposed primarily . . . cost of litigation" and inserting in its place "interposed primarily for a reasonable and proper purpose, and that any effect of harassment, delay or increase in the cost of litigation is unavoidable in the accomplishment of that purpose." This would put obligation on movant to state his purpose if challenged, and provides added incentive to search for alternative means of achieving desired end.

H. Trawick, Jr., Esq. 8/5/81

Criticizes certification requirement as mere formality. Many jurisdictions formerly had similar requirement, which was abolished when it became apparent that it had no real effect. Suggests, as alternative, assessment of costs and fees at time motion is granted or denied without any reference to subjective intent of movant.

J. Cummings, Jr. Esq. 8/26/81

Specifically endorses certification requirement.

Prof. R. Abrams 9/21/81

Endorses certification requirement, but suggests changing title of Rule 11 to include pleadings and other papers, and eliminating Rules 7(b)(3) and 26(g) as repetitive.

- R. Barton 9/22/81
Endorses certification requirement.
- E. Cutler, Esq. 9/15/81
Suggests adding a colon after "him" on p. 6, line 10.

- K. Lovejoy, Esq. et al. 10/13/81
Delete third sentence, lines 6-9, with the ACN indicating that the deletion is solely in the interest of brevity and does not revive the old rule.

Suggests changing "it is well grounded in fact and is warranted by existing law" to "there is good ground in fact to support it, and it is warranted by existing law . . . "

Suggests deleting final sentence and the creation of a new sanctions rule that consolidates the sanctions provisions of Rules 7, 11, 16, 26 and 37. The new rule would characterize fees and expenses as "restitution," and only true penalties will be labeled "sanctions," in an attempt to overcome the courts' hesitancy to impose sanctions on lawyers.

- J.P. Arness, Esq. ACTL, at 10/16 hearings
Submitted a draft containing revisions of the proposed amendment to Rule 11:
- (1). Reinstate "there is good ground to support it" at line 12;
 - (2). Delete lines 13-15 "formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;"

(3). Add to line 17 after "pleading" the words "motion, or other paper provided for by these rules"

(4). Reword final sentence to require notice and a hearing to determine violations of rule, so it will now read: "If, upon motion or upon its own initiative, the court after notice and hearing finds that a pleading, motion, or other paper provided for by these rules has been signed in violation of these rules, the court may impose upon the person who signed it, a represented party or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

(5). Change caption to read: "Signing of Pleadings, Motions and Other Papers Provided for by these rules; sanctions"

- M. Bowers, Esq. Att.Gen., Ga. 10/16/81

(1). Should retain current language of Rule 11

re: standard of inquiry, since many form complaints in employment, environmental and other litigation are typically very conclusory, and "good ground to support" may be all that is reasonable to demand. Imposing a higher standard, if stringently enforced, may effectively preclude many of these cases from getting off the ground.

(2). From defendants' point of view, the new standard is also too demanding, since it will be difficult to satisfy that standard in responding to very conclusory complaints. This is especially so since neither Rules 8 nor 12 are being

changed, and R. 8 provides for liberal pleading while R. 12, as current interpreted, makes it very difficult for a defendant successfully to move to dismiss or clarify complaints. It thus seems inappropriate to toughen the Rule 11 standard but to leave Rules 8 and 12 intact.

(3). Fears that by toughening Rule 11, too much emphasis will be placed on the pleading stage, and Rule 11 rather than the discovery rules or Rules 12 and 56 will be excessively relied upon to test the adequacy of pleadings. This is especially so since Rule 11, unlike Rule 37(a)(4), does nothing to inhibit the bringing of motions under Rule 11 (37(a)(4) provides for expenses to opposing party when motion is denied).

(4). Questions why the inquiry standards for Rules 7 and 11 are different, and feels that the ACN for Rule 11 are cryptic at best on this issue. Moreover, if there should be a difference, the Rule 7 standard should be the more exacting one, since motions usually come later than pleadings and therefore the lawyer has much more information in filing motions than in filing pleadings. Therefore, the tougher standard in the proposed Rule 11 again places too much emphasis at the pleading stage.

(5). Overall, feels that the changes, contrary to the general philosophy of notice pleading, excessively emphasis the pleading stage of litigation.

COMMENTS RE: RULE 7 (AND 11)

SOURCE

COMMENTS

Hon. M. Schroeder 11/6/81 Statement to accompany testimony

(1). Feels that certification requirement represents meaningless "tinkering" with the rule that may lead to extensive satellite trials concerning alleged abuses. Cites a Lexis search revealing no case where the absence of the word "primarily" has caused a court not to impose sanctions. Furthermore, questions how the court is to determine what constitutes a "good faith argument" under Rule 11.

(2). Also feels that the sanctions provisions, which are arguably independent of the certification provision, are not worth having. Sees no evidence of widespread abuse of motions practice.

In general, does not feel that the potential for much litigation concerning lawyers' motivation in filing papers is a price worth paying for the proposed changes.

C. Chester, Esq. 10/2/81 letter to Schroeder, at p.16 of Schroeder statement.

Approves of Rule 7 changes; feels dilatory motions are commonplace and should be the subject of harsh sanctions.

Prof. C. Wright 10/8/81 letter to Schroeder, at p.17 of Schroeder statement

(1). Feels that current Rule 11 makes clear that motions are covered as well, hence no need for separate rule.

(2). The different language of Rules 11 and 7 is confusing; the ACN gives the judge no guidance on what the difference is.

(3). Generally, feels that the set of proposed changes are an "embarrassment" "devoid of substance."

Prof. E. Cooper 10/12/81 letter to Schroeder, at p. 20 of Schroeder statement

(1). Supports the certification requirement as an "explicit reminder to counsel."

(2). Prefers incorporating Rule 11 into Rule 7 by reference, and adopting the language of Rule 11.

(3). Suggests deleting the word "primarily" and indicating in the ACN that different settings involve different problems, e.g., a single pleading or motion may involve both proper and improper matters; proper matter may be pursued through improper means, etc. Should also make clear that sanctions are appropriate only in the case of clear impropriety.

(4). Worries that ACN comment concerning time available for investigation may imply that overburdened counsel can get away with lower standard of care.

Hon. A. Rubin 10/26/81 letter to Schroeder, at p. 23 of Schroeder statement

(1). Sees the duplication between Rule 11 and 7(b)(3) as somewhat justified by a desire for symmetry.

(2). Supports the certification requirement and sanctions provision as prophylactic and as a worthwhile experiment.

Fed. Bar Ass'n Counc. on Fed. Litig.

A. Belcuore, Chrm. 11/16/81

Supports permitting court to impose sanction on its own motion, and for sanctions directly against an attorney. However, would reinstate the present "good grounds to support" standard. And would delete the third sentence from the present Rule 11.

J. Dushoff 11/4/81

"Good faith argument" language may chill attorneys from making daring arguments in hopes of changing established precedents.

Chi. Bar Ass'n 11/13/81

Feels that the modifications are not necessary, but does not oppose them. Suggests clarifying that sanctions should be imposed against the responsible party or person, which may not always be the signing person in a situation, for example, where a junior associate signs for a senior partner.

H. Schmidt, Esq.

Agrees with need to strengthen R. 11. Suggests adding provision that where court justifiably believes a violation has occurred, it may on its own initiative or upon motion order expedited discovery or investigative proceedings with respect to the alleged non-compliance.

Martin Glenn Chrmn, Comm. on Fed. Cts., State Bar of Calif. L.A. public hearing 11/6/81 Transc. pp. 61-76

Supports 7 & 11 with following changes:
Fears that "reasonable inquiry" standard

threatens the attorney client privilege and the work product privilege.

- majority of the committee would favor retaining the "reasonable inquiry" standard if the ACN makes clear that the standard is not intended to invade the privileges;

- the entire committee would favor deleting the "reasonable inquiry" standard coupled with the ACN addition.

COMMENTS RE: RULE 11

SOURCE

COMMENTS

Sullivan & Cromwell 11/12/81

Lengthy, thoughtful comments on Rule 11. Essentially agrees with the changes, especially the "reasonable inquiry" standard and the mandatory sanctions.

However, suggests one major addition: provide for striking of pleadings that violate the Rule's certification standard by adding at line 27 after "include" the following: "an order striking the pleading".

REASONS:

1. Pleadings are the gateway to discovery; thus to control discovery effectively court must be empowered to strike pleadings at an early stage.

2. Current Rules 8, 9, 12, and 56 do not provide adequate protection against pleadings filed without adequate basis.

3. The sanctions, which the ACN indicates will normally be determined at the end of the litigation, will be inadequate to deter unjustified pleadings at the outset and may not adequately compensate for all the costs associated with

defending against unfounded accusations, such as time spent by personnel responding to unwarranted discovery requests, excessive invasion of privacy, the stigma of long-standing unwarranted accusations and so on. Therefore, need to give power to courts to strike pleadings early enough to protect against these harms.

4. Agrees with ACN that current Rule 11's provision for striking pleadings is poorly written. Thus would opt for simple addition indicated above.

[Note: does not discuss the fact that proposed addition will necessarily telescope to the beginning of the litigation the determination of whether Rule 11 is violated, whereas the current proposed rule contemplates the Rule 11 sanction determination at the end of litigation. There is thus the increased possibility of Rule 11 hearings during the course of discovery to determine whether at any given time particular parts of the pleadings should be stricken.]

[Comments on other rules omitted in printing]

RESPONDENT'S

BRIEF

6
No. 88-791

JUN 2 1968
JOSEPH P. SPANGLER
CLERK

In the
Supreme Court of the United States

October Term, 1968

PAVELIC & LeFLORE (now dissolved),

Petitioner,

— against —

**THE MARVEL ENTERTAINMENT GROUP, a division
of CADENCE INDUSTRIES CORPORATION, JAMES
CALTON, AL BRODAX, MICHAEL S. KLEIN, THE
SHUKAT COMPANY, LTD., SCOTT SHUKAT and
PETER S. SHUKAT ESQ.,**

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF FOR RESPONDENT
PETER S. SHUKAT, ESQ.**

NORMAN B. ARNOFF
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75812

QUESTIONS PRESENTED

1. Does amended Rule 11, by its plain meaning, expressly preclude a District Court from imposing reasonable litigation expenses for a violation on the law firm whose lawyer filed the offending paper?

2. In view of the express purpose of the rule to enlarge professional responsibility are law firms liable for reasonable litigation expenses when their lawyers, in the ordinary course of the firm's practice, commit violations of Rule 11's certification requirements?

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STATUTES INVOLVED

Rule 1 of the Federal Rules of Civil Procedure, as amended February 28, 1966, eff. July 1, 1966, provides:

Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 7(b)(3) of the Federal Rules of Civil Procedure, as amended January 23, 1963, eff. July 1, 1963; April 28, 1983, eff. August 1, 1983, provides:

(b) Motions and Other Papers

(3) All motions shall be signed in accordance with Rule 11.

Rule 11 of the Federal Rules of Civil Procedure, as amended April 28, 1983, eff. August 1, 1983; March 2, 1987, eff. August 1, 1987, provides:

Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome

by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

DEFINITIONS

The terms defined are for the Court's reference. The definitions assist in understanding the nature of the Rule 11 violation and are also of importance in clarifying the meaning of Rule 11.

1. The definition of "facsimile" is as follows:

facsimile, n. 1. an exact copy or likeness, as of handwriting. . . .

in facsimile; as an exact likeness; in exact reproduction.

Webster's New Twentieth Century Dictionary of the English Language Unabridged, 2d ed., The World Publishing Company, Cleveland and New York, 1968, pp. 655-656.

FACSIMILE. An exact copy, preserving all the marks of the original.

Black's Law Dictionary, 4th ed., West Publishing Co., St. Paul, Minn. 1951, p. 706.

2. The definition of "attorney of record" is as follows:

Attorney of record. Attorney whose name must appear somewhere in permanent records or files of case, or on the pleadings or some instrument filed in the case, or an appearance docket. [citation omitted] Person whom the client has named as his agent upon whom service of papers may be made. [citation omitted].

Black's Law Dictionary, 4th ed., West Publishing Co., St. Paul, Minn. 1951, p. 164. *See also Ballentine's Law Dictionary*, 3rd ed., Lawyers Cooperative Publishing Co. 1969, edited by William S. Anderson, p. 109.

3. The definition of "signature" is as follows:

a person's name written by himself, or a representation of this in a mark, stamp, deputy's handwriting etc.

Webster's New World Dictionary of the American Language, College Ed., 1966.

4. The definition of "certify" is as follows:

to testify in writing; to make or establish as fact.

Black's Law Dictionary 287 (4th ed. 1951)

to testify by formal declaration, often in writing; to make known or establish (a fact).

Webster's New Twentieth Century Dictionary 297 (2d ed. 1968).

PRELIMINARY STATEMENT

A writ of certiorari was granted by this Court on February 21, 1989 to resolve a conflict in the Circuits on the liability of a law firm partnership under Rule 11 of the Federal Rules of Civil Procedure. The sole issue is whether a law firm partnership may be held liable for reasonable litigation expenses when a federal court paper is signed in violation of Rule 11 on behalf of the law firm by one of its partners.

Radovin Pavelic, Esq. ("Pavelic"), a member of the now dissolved law partnership of Pavelic & LeFlore, the petitioner, argues that neither he nor the law firm should be held liable because he did not sign the court papers found to be in violation of Rule 11 and the Rule does not permit imposing liability on a law firm for a violation committed by one of its members.

Pavelic states that his former partner, Ray LeFlore, Esq. ("LeFlore"), undertook to prosecute the action before the formation of their law partnership, and represented the plaintiff, Northern J. Calloway ("Calloway"), throughout all the proceedings, including the period when their partnership was in existence. Pavelic argues that it was LeFlore who signed the offending court papers in the name of Pavelic & LeFlore, and, therefore, LeFlore alone should be liable for the violations of Rule 11.

Respondent contends that the purposes of amended Rule 11 fully justify the application of traditional principles of partnership and agency law to this case, and, therefore, the Pavelic & LeFlore law firm should be liable for the serious Rule 11 violations.

STATEMENT OF FACTS

A. Pertinent Background

In December 1982, Calloway, an actor known for his regular appearances on the children's television program, "Sesame Street," instituted this action seeking \$11,000,000 in compensatory

damages and an unspecified amount in punitive damages for willful copyright infringement of his science fiction motion picture script, "The Skyrider," malicious destruction of this script, intentional breach by the lawyer defendants of their professional obligations, breach of contract, breach of fiduciary duty and civil conspiracy.

The defendants were Calloway's former lawyer, Peter S. Shukat, Esq. ("Shukat"), Calloway's personal manager, Scott Shukat and his company, The Shukat Company, Ltd., The Marvel Entertainment Group ("Marvel"), James Galton ("Galton") and Al Brodax ("Brodax"), Marvel's chief executive officer and artistic consultant, respectively, Michael Klein ("Klein") and Louis Quiros ("Quiros"), Calloway's former partners in a close corporation, LMN Productions, Inc. ("LMN") and Egon Dumler, LMN's lawyer.

The gravamen of the action was that Calloway authored and developed "The Skyrider," which Marvel materially changed in a manner that constituted copyright infringement. Annexed to the original complaint were copies of contracts signed by Calloway, which, in unambiguous terms, provided a complete defense to the claim of copyright infringement, the only federal claim asserted. Defendants' motion to dismiss the complaint was granted by the District Court with an opportunity for Calloway to replead.

On August 1, 1983, an amended complaint was filed. The amended complaint alleged that Shukat forged Calloway's signatures to the contracts by placing Calloway's facsimile signature on such agreements. This claim of forgery and alleged conspiracy among the defendants vitiated Marvel's pre-answer motion defense that the contracts accorded Marvel the license to change the script in order to develop it commercially. This linchpin charge sustained the lawsuit through four years of litigation, which culminated in a six-week trial in April and May 1986.

In February 1984, defendants moved for summary judgment on the basis that the contracts were, in fact, signed by Calloway, that Marvel had the right to change The Skyrider script to render it commercially marketable, and that, therefore, there could be

no copyright infringement. The motion was denied by the District Court in July 1984 because Calloway denied the genuineness of his signatures on the key contracts.

By October 1984, LeFlore and Pavelic, had formed the law partnership of Pavelic & LeFlore and continued the representation of Calloway in the action as Pavelic & LeFlore. (A, pp. 207-208).¹ Subsequent to the formation of the partnership, the charge of forgery and document tampering by Shukat was reasserted in papers filed with the Court, to wit,

1. Plaintiff's Interrogatory Responses to Shukat, dated April 22, 1985 (A 94-100);

2. Plaintiff's answers to Quiros' interrogatories dated June 3, 1985 (A 101-109 [108]);

3. Plaintiff's Order to Show Cause, Amended Complaint and Memorandum of Law, dated January 28, 1986, seeking to reassert all previously dismissed state law claims, including those based on paragraph 52 of the Amended Complaint (A 151-168 [¶ 12.155]);²

4. Plaintiff's pre-trial order on March 25, 1986 (A 110-150 [123-124]).

These court papers were signed by the law firm of Pavelic & LeFlore, by its partner, LeFlore.

¹ "A" denotes references to the Joint Appendix. Pavelic claimed that Pavelic & LeFlore was not formed until October 1984, while LeFlore stated that it was formed on May 1, 1984. The District Court used the October 1984 date in its December 23, 1986 sanction decision. (Petition for Certiorari, 147a).

² Shukat was previously dismissed as a defendant because of the absence of federal claims against him but impleaded by the other defendants on the basis of the forgery allegation. In consequence of this Order to Show Cause, shortly prior to the trial, the District Court permitted plaintiff to bring back Shukat into the case as a defendant and not as a third-party defendant. Pre-trial Conference TR., 3/31/86, pp. 17-19, 37, 42-59.

Furthermore, all court papers in the litigation, including those above mentioned, prepared after the formation of the law partnership, were signed as follows:

Pavelic & LeFlore
By Ray L. LeFlore /s/
(A Member of the Firm)
Attorneys for Plaintiff

The arrangements for and the litigation of this action clearly indicate a considerable awareness, as well as involvement, of Pavelic and his law firm. The action was undertaken, in part, pursuant to a contingent arrangement joining the prospect of substantial monetary recovery for Calloway with a significant economic interest for the law firm. (A, p. 197 ¶ 40). Substantial out-of-pocket expenditures (\$60,000) attendant to the prosecution of the case were also advanced by the law firm. Petition for Certiorari, p. 64a.

Not only did the case represent a considerable potential asset to the partnership by reason of the amount of damages prayed for, but it occupied an enormous portion of the law firm's time as well. The law firm had other lawyers participate with LeFlore under the law firm's letterhead throughout the pre-trial and trial proceedings. Evidencing the substantial time and costs involved, more than 40 days of depositions of 18 witnesses were taken in the pre-trial phase. Furthermore, depositions of experts were taken during the trial phase in the evening hours. (A, p. 196, ¶ 36).

In June 1985, monetary sanctions for discovery abuse were imposed against the law firm and checks were written by Pavelic on behalf of his law firm. (A 206-211). Concerning Pavelic's role in the litigation, LeFlore, in the Rule 11 sanction stage of the proceedings, submitted an affidavit stating,

Mr. Pavelic was intimately involved (and kept apprised) of, all developments and strategy decisions in this action (*Calloway v. Marvel et al.*) and would obviously have benefited directly from any recovery in the same proportion as I. (A. p. 206, ¶ 2, p. 208).

The trial lasted six weeks, spanned 4,433 pages of trial transcript, involved the presentation of psychiatric testimony concerning Calloway's unstable mental condition in 1982 at the time the charges were initially conceived against Shukat and the other defendants, and involved several hundred exhibits as well as expert testimony concerning the challenged contract documents. The District Court withdrew any allegations of forgery or document tampering from the jury's consideration and directed a verdict in favor of the defendants on those issues. The jury deliberated for only six hours and reached a verdict rejecting all of Calloway's other claims as well. Aggregate litigation fees and expenses of the defendants exceeded \$900,000.

Post-trial motions for sanctions were made against Calloway, LeFlore and Pavelic & LeFlore. The District Court, (Honorable Robert J. Sweet, U.S.D.J.) in decisions dated August 1, 1986 and December 23, 1986, reported, at 111 F.R.D. 637 and 650 F. Supp. 684, respectively, awarded monetary sanctions for violations of Rule 11 against Calloway of \$100,000, against LeFlore, individually, of \$50,000, allocating this share of the liability for pre-partnership activity, and against the law firm of Pavelic & LeFlore of an additional sum of \$50,000 to be borne jointly and severally by its two named partners.

The United States Court of Appeals for the Second Circuit, in a decision dated August 12, 1988, reported at 854 F.2d 1452, affirmed the District Court with respect to its determination of violations of Rule 11 and its imposition of sanctions on LeFlore, as well as Pavelic and LeFlore, but remanded the case to the District Court for the determination of the appropriateness of sanctions against Calloway and whether additional sanctions should be borne by LeFlore and Pavelic & LeFlore.

B. The Rule 11 Violation

In the amended complaint, responses to interrogatories and the pre-trial order filed and served after the formation of the

Pavelic & LeFlore law partnership, Calloway, through his attorney of record, made the following charge against Shukat,³ to wit:

51. In furtherance of [the defendants'] scheme, . . . at Marvel's behest, Klein, Quiros and Dumler, upon information and belief, on or about August 5, 1981, solicited Peter Shukat to assist in their misappropriation of plaintiff's rights in respect of "THE SKYRIDER". Peter Shukat was then plaintiff's attorney, retained to advise plaintiff regarding "THE SKYRIDER".

52. On or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, back-dated to June 8, 1981, purporting to confirm by formal agreement the terms and conditions of a putative option for LMN to acquire "THE SKYRIDER".

53. Peter Shukat had no authority whatsoever to purport to affix plaintiff's signature to said documents, and did so in blatant contradiction of his fiduciary duties and obligations to plaintiff.

C. Evidence of the Rule's Violation

The District Court described that by a "narrow margin," Calloway had stated material issues of triable fact to avoid summary judgment. (A 88). Calloway did this in an affidavit drafted by LeFlore, which now must clearly be viewed as violating Rule 56(g). The gist of this affidavit was again to charge that Shukat,

³ Shukat's honorable service to Calloway extended over eleven years prior to the December 1982 commencement of the action and involved not only representing Calloway as his attorney in all his business and artistic dealings, but entailed substantial assistance in 1980 and 1981, both as legal advisor and witness, in Calloway's successful insanity defense to a criminal assault charge in Nashville, Tennessee. For this service in June 1982, Calloway wrote Shukat a letter of "eternal gratitude." (Trial TR. pp. 1276-1280, 1287, 1289-1291).

while still Calloway's attorney for "The Skyrider" project, conspired with the other defendants, to misappropriate the project by forgery of Calloway's signatures on the essential contract documents. Leaving no question as to the pleader's claim of Shukat's dishonesty and want of professional integrity, LeFlore had Calloway swear to the following:

6. On July 29, 1983, I caused my Amended Complaint in this action to be served in accordance with this Court's order dismissing the original complaint. The Amended Complaint alleged the same operative facts as the original complaint — viz., Marvel's preparation of a derivative work based in large part on my script for "The Skyrider", and Marvel's display through-out the entertainment industry of that infringing work in cooperation with Klein and Quiros, among others. However, I did not refer to, or annex, those documents which, I learned in the interim, had been contrived and forged by defendants. Instead, the Amended Complaint charged:

52. On or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, back-dated to June 8, 1981, purporting to confirm by formal agreement the terms and conditions of a putative option for LMN to acquire "THE SKYRIDER".

The documents referred to above, which I believe Peter Shukat contrived (and others perhaps forged) while he was my attorney and trusted advisor, are: the option agreement, the writers agreement and the composition agreement, all dated June 8, 1981, annexed to the original complaint as the second, third and fourth documents, respectively, comprising Exhibit C.

Calloway Affidavit, sworn to on April 2, 1984. (A-58)

In November 1984, LeFlore, now a member of the law firm of Pavelic & LeFlore, and continuing the representation through

that firm as attorney of record for Calloway, furnished to a document examiner, Pearl Tytell ("Tytell") specimen signatures to determine the genuineness of the Calloway signatures on the key contracts. Following her analysis, Tytell advised LeFlore that Calloway "possibly" signed the contracts. (A 151-168 [¶ 14-17, 28, 155-157, 162]).

No disclosure was made in the course of the lawsuit of Tytell's oral opinion as to the genuineness of Calloway's signatures. In fact, LeFlore and his law firm significantly circumvented discovery by avoiding answers to straightforward interrogatories on the forgery issue and concealing the substance of Tytell's opinion. (A 151-168 [¶ 20-29, 158, 162]).

For Shukat the charges had serious repercussions; if true, they meant his disbarment and possible criminal prosecution. Nonetheless, the pivotal "facsimile claim" was restated after the Tytell November 1984 document examination; after LeFlore and his law firm received written notice in June and July 1985 that Paul Osborn, Shukat's document examiner, determined that Calloway's signatures were genuine; and after Shukat's counsel wrote to LeFlore that Rule 11 sanctions would not be sought if the forgery and document tampering charges against Shukat were dropped. Petition for Certiorari 24a-31a.

Shortly before trial in April 1986, LeFlore varied the charge only slightly from outright forgery and told the District Judge, "[t]he claim is that there are two pages of a document the signatures of which were altered and they were slapped on to another document which the man never saw or signed." (TR. Pretrial Conference, March 31, 1986, pp. 49-51).

At trial, Calloway had to admit he had "no real evidence" of Shukat's forgery, and was, in effect, prompted by LeFlore to make the forgery claim because of LeFlore's representation that a document examiner stated Calloway's signatures on the key contracts were "improperly affixed facsimile signatures" (A 219-224). Also at trial, Shukat testified that before the institution of the action, he had a conversation with LeFlore to the effect that if Shukat

did not relinquish an attorney's lien on Calloway's papers, LeFlore would cause Shukat's disbarment. (A 224-229).

The District Judge, in addition to presiding over the trial, received papers in support of and in opposition to the motion for sanctions and held hearings where both sides, including the sanctioned attorney and his law firm, had a full and fair opportunity to address the Court.⁴ In awarding the sanctions, the District Court determined that the defendants among them should share proportionately \$200,000, approximately the average litigation expense for each of the defendants who continued through the trial, and further allocated the sanctions award on the basis of what preceded and what followed after the partnership's formation. Petition for Certiorari 153a-156a.

The Court of Appeals concluded, regarding Pavelic's and his law firm's participation in the litigation, that

Pavelic himself was no passive observer in the Calloway litigation. He has admitted that he "often discussed" the case with LeFlore, that he attended several depositions and days of trial, and that he insisted that Raymond L. Levites be retained as special counsel for the trial. The firm's role was thus typical rather than exceptional.

Petition for Certiorari, p. 64a.

Petitioner now asks this Court to relieve it of its responsibilities as a law firm partnership which improperly pled the frivolous charge against Shukat and thereby maintained this totally unfounded and excessively costly litigation against all the defendants.

⁴ The transcript of the June 27, 1986 sanction hearing before United States District Judge Robert Sweet constitutes the Appendix to this brief. (TR. June 27, 1986, pp. 1-28).

SUMMARY OF ARGUMENT

A. Petitioner's brief is based upon two principal premises, both erroneous. First, petitioner argues that because historically the federal courts [Equity Rule 24, 226 U.S. 655 (1922)] required pleadings to be "signed individually by one or more solicitors of record," a requirement carried forward in Rule 11, this abrogates the responsibilities of law firms for the acts of their lawyers. Neither modern Rule 11, nor its legislative history, nor the Rule's antecedents, nor the predecessor version of the Rule, support any such proposition.

Second, petitioner also argues that because there is no express provision in the amended rule for holding a law firm liable for reasonable attorneys' fees as a result of the signing violations of its members and associates, authority does not exist to impose such sanctions. Rule 11, however, consistent with Rule 1 of the Federal Rules of Civil Procedure, is to be construed liberally. The Rule was expressly intended to "[build] upon and [expand] the equitable doctrine permitting the court to award expenses, including attorneys' fees" and, accordingly, law firm liability can be imposed where appropriate. ACN-1983 at 408 (West supp. 1989).

B. The principal purpose of the requirement in the federal courts of having the individual attorney's name on the pleadings and other papers was not to exonerate law firms from responsibility for the contents of those pleadings and motions, but to make individual attorneys stop and think before the filing of a federal court paper and to facilitate the enforcement of the Rule without the necessity of satellite litigation. Furthermore, when a lawyer signs a federal court paper on behalf of his law firm, as was clearly done in the instant case, the law firm's name constitutes both its signature and certificate.

C. Rule 11 is the important professional responsibility rule for the United States district courts. Rules 1, 7 and 11. The principal purpose of the amendment to Rule 11 was to strengthen professional responsibility and reduce the burden on the federal courts

by assuring that pleadings and other court papers filed are preceded by a due diligence inquiry into the underlying facts and law. That purpose is furthered, rather than hindered, by imposing liability for its breach upon the law firm on whose behalf the individual attorney has signed.

D. Petitioner's argument that a law firm is insulated from the liability of paying reasonable litigation expenses would undermine the important purposes the Rule was intended to accomplish. Greater professional responsibility will not be achieved by the interpretation argued for by the petitioner because there will be no incentive for law firms to do internal monitoring when only one lawyer will bear, perhaps fortuitously or by design, the economic liability for the violation.

E. Lawyers and their law firms, by mutual choice, associate together in the practice of the profession and, therefore, both the responsibility and the liability proceeding from those choices should be fairly imposed on the the firm as well as the individual lawyer. Where those choices are evidenced in the signature on a paper intended for filing in the federal court, the violation of the certification requirement of Rule 11 must subject the law firm, where appropriate, to liability.

F. The limitation as argued for by petitioner would be a Rule 11 exemption for law firms and would diminish the public's respect for the courts and the profession. Such a limitation would make the deterrent and the remedy of litigation cost shifting illusory and thereby defeat the Rule's good purposes.

ARGUMENT

I. NEITHER THE DRAFTER'S INTENT NOR THE LANGUAGE OF AMENDED RULE 11 EXCLUDES A LAW FIRM'S LIABILITY FOR REASONABLE LITIGATION EXPENSES WHEN ONE OF THE LAW FIRM'S MEMBERS SIGNS A COURT PAPER IN VIOLATION OF THE RULE

The plain language of Rule 11 does not restrict the imposition of sanctions to the attorney who signed the offending court paper. Review and analysis of the language of the amended Rule and the advisors' notes suggest no such limitation of the District Court's power to hold a law firm partnership liable for reasonable litigation expenses caused by the violation of Rule 11 by one of its members.

The amended Rule supercedes the old rule, which provided for the striking of a sham pleading, judged conduct on the basis of the subjective intent of the pleader, and only provided for the further remedy of attorney discipline for an attorney violator of the rule. The new rule places at the District Court's disposal a range of equitable remedies, including litigation cost shifting. Such remedies were intended to further the rule's prime purpose of deterring litigation abuse. See Advisory Committee Notes to 1983 Amendment of Rule 11, 28 U.S.C.A. § 11 at 390 (West Supp. 1989) (hereinafter, "ACN-1983"); see generally 2A Moore, *Moore's Federal Procedure*, ¶ 11.01(3) (1987).

The amended Rule provides in clear language that the attorney of record — the attorney who enters an appearance and receives all notices — or one of its members must sign a court paper, including the pleadings, after a reasonable inquiry into the facts and the law.

It is the designation of who is actually to receive notice and process that makes clear the meaning of attorney of record. *Ostrer v. Aronwald*, 425 F. Supp. 962, 966 (S.D.N.Y. 1976). It is the law firm which enters an appearance indicating its office and mailing address to which process and other notice is to be delivered.

Where a law firm has been engaged, it is the law firm that is the attorney of record.

The law firm continues the lawsuit irrespective of any change in personnel and until terminated by the client. Most significantly and probative of all of the foregoing is the time-honored custom that the law firm's name, often containing the names of deceased founders, appears in court papers where the law firm is attorney of record. *Mendelsohn v. Equitable Life Assurance Society*, 178 Misc. 152, 33 N.Y.S.2d 733 (App. T. 2d Dep't 1942); *Phillips v. Cahill Gordon & Reindel*, 109 Misc.2d 656, 440 N.Y.S.2d 809 (S. Ct. N.Y. Co. 1981).

The signature of the attorney or the party, in the attorney's absence, gives an assurance that the court paper is neither frivolous nor interposed for any improper purpose. ACN-1983 at 408 (West Supp. 1989). The essence of the rule is that the attorney's act of signing a court paper is a certification of the signer's perception of merit and ethical validity. ACN-1983 at 408 (West Supp. 1989). Violations of the certificate are to be judged as of the time of the signing and by the standard of the reasonably competent attorney. ACN-1983 at 408 (West Supp. 1989). Where the rule is violated and the other party to the litigation is forced to incur unnecessary litigation expenses, the Court in which the violation occurred has the power both to compensate the injured party and to strengthen the awareness of the responsibilities of those having access to the Courts. Litigants, as well as members of the legal profession, who have caused a violation are thus subject to the reasonable litigation costs incurred by their opponents. ACN-1983 at 409 (West Supp. 1989).

A person's liability for the violation of the Rule is determined in part by consideration of whether he is a party — a represented party with a legal advisor or a party appearing *pro se* without legal advice — the attorney of record, or one of its members. ACN-1983 at 409 (West Supp. 1989). The attorney is tutored in the law and is presumed to know the rules of his profession. He is judged, and not unfairly, by a higher objective standard, which has applicability to all the profession's members. ACN-1983 at

408 (West Supp. 1989). In consequence, although the client's liability is expressly authorized for the attorney's violation, under appropriate circumstances, the client is not assessed with the liability. *Greenberg v. Hilton International Co.*, 870 F.2d 926 (2d Cir. 1989); *Ballard's Service Center, Inc. v. Transue*, 865 F.2d 447 (1st Cir. 1989); *Kerans v. Porter Paint Company, Inc.*, 866 F.2d 431 (6th Cir. 1989); *Maduakolam v. Columbia University*, 866 F.2d 53 (2d Cir. 1989).

No express limitation is stated for the litigation cost shifting remedy in the amended Rule. The advisors did not declare their limiting intent by pointing to any language in the Rule signifying a limitation. This would have been simple enough for the drafters to do if that was their intent. They could have said, but did not, that the liability for the adversary's litigation costs was limited to only such attorneys who signed the court paper, whether or not those attorneys were the actual attorneys of record or its members.

Since a significant number, if not the majority, of civil trial lawyers are members of law firms, it is natural to presume that such a limitation in this context, with the significant policy considerations implicated, would have been clearly expressed. An implied prohibition against imposing on a law firm the liability for a Rule 11 violation is not warranted. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-632 (1962); *Platts v. E.F. Hutton & Company*, 871 F.2d 1088 (6th Cir. 1989).

Petitioner's argument "that sanctions against counsel not founded in specific statutory authority must be preceded by 'a specific finding as to whether counsel's conduct . . . constituted or was tantamount to bad faith. . . .'" in reliance upon *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, (1980), is not valid. In contrast to the issues presented by that case, the imposition of Rule 11 economic liability does not involve the possible distortion of a settled statutory framework, create a conflict with the application of other related statutes, or involve solely the assertion of the inherent powers of the Court to justify the imposition of attorneys' fees as sanctions.

Unlike the considerations faced by this Court in its construction of 28 U.S.C. § 1927, in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), Rule 11 was always intended to be construed like other procedural rules, "to secure the just, speedy and inexpensive determination of every action." Rule 1. This injunction for liberal construction is "explicitly" stated "with unmistakable clarity" and therefore "[t]here is no place in the federal civil procedural system for the proposition that rules having the force of statute, though in derogation of the common law, are to be strictly construed." *G. Heileman Brewing Co., Inc. v. Joseph Oat Corporation*, No. 86-3118 (7th Cir. March 17, 1989) (available May 1989, on LEXIS, Genfed library, Courts file).

This Court placed a restrictive interpretation on "costs" in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, (1980). The holding precluded the assessment of attorneys' fees under 28 U.S.C. § 1927. Congress then gave the judiciary authorization "to require attorneys to satisfy excess costs, expenses, and attorney fees reasonably incurred because of multiplication of proceedings." 28 U.S.C.A. § 1927 (West Supp. 1987). Here, too, in the case of 28 U.S.C. § 1927, Congress expressed its intent to strengthen the attorney's responsibility.

Therefore, now to strictly interpret Rule 11, a procedural rule, using a standard of construction fitting for a penal statute is incorrect. To the contrary, Rule 11 is not even remotely a penal statute. The liberal construction of Rule 11 mandated by Rule 1's general directive is also reenforced by the proposition that the defense of subjective good faith, traditional in most criminal and quasi criminal proceedings, is no longer a defense to attorney violation of the certification requirement. See *Kerans v. Porter Paint Company, Inc.*, 866 F.2d 431 (6th Cir. 1989); *Kale v. Combined Insurance Company of America*, 861 F.2d 746 (1st Cir. 1988).

The Rule does provide, petitioner states, for a form of vicarious liability for a non-signatory. The represented party whose misconduct joins or causes his attorney's false certification of compliance with the rule is adjudged liable. In the case of the represented party, his signature is not the determiner of liability for breach

of the civic responsibility required by the Rule. Represented party verification of pleadings, except in noted and limited instances, is no longer required by the Federal Rules of Civil Procedure, although the represented party's liability remains. ACN-1983 at 409 (West Supp. 1989). What creates the liability for the represented party is his status as a party and his knowledgeable association with the Rule's violation. Such liability of the client derives from the attorney's signature as the client's agent and is in keeping with previous decisions of this Court.

This Court found meritless the argument that the dismissal of a claim based on an attorney's unexcused conduct imposed an unjust penalty on the represented party, observing:

Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." (Citation omitted).

Link v. Wabash Railroad, supra, at 633.

In this very material respect, the liability of the represented party for his attorney's violation, Rule 11 clearly does not exclude, but expressly allows for the derivative liability of one person or entity based on the signature of another.

Thus, the attorney signature requirement is neither a reason for nor a limitation of the liability of the lawyer's firm for his conduct. Where a law firm is litigating a matter, the attorney signature requirement is, literally, a two signature requirement. The firm name's attachment to the court paper is a certification of due diligence and proper purpose, and the individual's name is a means for the Court to easily bring before it the most knowledgeable and responsible lawyer.

The signature of the individual attorney is the starting point of meaningful inquiry to determine whether a violation occurred. By way of example, if a complaint were to bear only the signature of a large law firm, and inquiry were made at the conclusion of the case some years later, absent an individual signature, the task of determining the adequacy of the pre-filing inquiry by the attorney who performed the task would be rendered more difficult.

Consistent with due process, the advisors suggested some of the following appropriate considerations for judging attorney conduct:

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

ACN-1983 at 408 (West Supp. 1989).

Therefore, the rational judicial inquiry necessary for an effective application of amended Rule 11 could not be performed without the signing by "at least one attorney of record in the attorney's individual name." Rule 11. The Rule would be unworkable if easy identification of the attorney assigned or engaged to do the required due diligence could not be readily determined. The signature "in the attorney's individual name" is documentary evidence on the issue of responsibility and a straightforward

way of avoiding, in part, the satellite litigation which the Rule's application was intended to avoid. See ACN-1983 at 408-409 (West Supp. 1989).

The requirement to have the most responsible lawyer on the case sign for himself and on behalf of the firm that he represents prevents hide and seek avoidance being played with the Court. Thus, identification of the attorney signing the court paper is an essential for sound judgment.

In fact, the petitioner's citation to the advisors' comments about who should sign — the more knowledgeable junior attorney or the senior attorney — only strengthens the argument that the signature requirement cannot be construed to be any type of limitation on the litigation cost shifting remedy. The more knowledgeable junior was to sign because he was the logical and best starting point for focused and fair inquiry as to whether the rule was violated. See Petitioner's Brief at 21, AA 15. See also ACN-1983 at 408-409 (West Supp. 1989).

The creation of a standard of judgment of attorney conduct to "one of reasonableness under the circumstances" sustains the proposition that law firms are and should be liable in most instances for violations by their members. The Rule does contemplate, as a defense to a charge of an unreasonable pre-filing inquiry, reasonable reliance on information obtained from others, including information communicated by "forwarding counsel or another member of the bar" and thus, does clearly foresee the interaction of lawyers in the filing of court papers. ACN-1983 at 408 (West Supp. 1989). Where such a defense is permitted, it would be incongruous for the law firm to escape liability by arguing that the person who puts his name and the firm's name on the paper bears the sole responsibility for the law firm.

In the context of an amendment to a procedural rule unqualifiedly intended to broaden professional responsibility, the signature requirement is also the basic means of assuring "the efficiencies achieved through more effective operation of the pleading regimen." The signature requirement accomplishes this end by "emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions."

ACN-1983 at 408-409 (West Supp. 1989). It is the obvious stimulus for the "stop and think obligation" that is at the heart of the amended Rule and not a limitation of liability. A. Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure* at 15 (Federal Judicial Center 1984).

Petitioner relies upon three Circuit Court decisions, *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988); *In re Miles Ruben v. Warren City Schools*, 825 F.2d 977 (6th Cir. 1987); and *Robinson v. National Cash Register Company*, 808 F.2d 1119 (5th Cir. 1987), as either holding or leading to the conclusion that there is no liability to the law firm where one of the firm's lawyers signs a court paper in violation of the Rule.

In *Robinson v. National Cash Register Company*, 808 F.2d at 1119, the papers signed in violation of the Rule were not signed by the violator on behalf of his law firm. The firm name merely appeared below the attorney's name with and as part of the mailing address.⁵ In this case, LeFlore clearly signed the offending court papers on behalf of his law firm partnership.

The *Robinson* court mistakenly read the rule solely as requiring "a pleading, motion, or paper to be signed by at least one attorney "in his *individual* name. Fed. R. Civ. P. 11 (emphasis added)." *Robinson v. National Cash Register Company*, 808 F.2d at 1132. "

In contrast, the language of Rule 11 requires that court papers "of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name." Rule 11. The individual attorney's name is not necessarily the equivalent of the name of the attorney of record. Therefore, the language of the rule also requires the law firm signature when it is attorney of record.

⁵ Respondents has researched the court records of *Robinson*, *supra*, and have lodged with the Clerk of this Court the specific court papers that were adjudged in violation of Rule 11 and the case's docket entries for this Court's reference.

In *Thomas supra*, the Fifth Circuit merely reiterated in a footnote the requirement of a signature and the fact that liability had to flow from that signature. In *re Miles Ruben, supra*, was not a case where a violator signed on behalf of a law firm. The lawyer for whom sanctions were in issue made an appearance as "additional counsel" to provide "academic guidance only" and the academician was neither a signer nor a person represented by any other lawyer's signature.

Thus, the foregoing cases cannot stand for the proposition that liability is limited to the signer, only for the proposition that liability, whether actual or vicarious, must proceed from a signature.

It certainly cannot be the physical act of signature that is the meaningful predicate for the Rule's liabilities. The signature as a special representation of validity or certificate of compliance is the basis for liability. Violation of the representation causes the liability to both the signer and the parties and persons, both natural and legal, on whose behalf the certificate is made. Otherwise, the ministerial act of signing, as opposed to what the signature represents, would have the important meaning. The Second Circuit clearly recognized this reality, holding that a law firm is "as much [an] endorser of a paper as the individual attorney who signs it," the law firm is "typically listed as counsel of record" and the "papers are generally signed by an attorney on the firm's behalf." *Calloway v. Marvel Entertainment Group*, 854 F.2d at 1479.

The Second Circuit, regarding the importance of the attorney's signature or, more appropriately described, the attorney's certificate, on the court paper observed,

Law firms hold themselves out to clients, to courts and to other counsel as more than mere aggregations of individual practitioners sharing a phone. They create good will through a firm name and use this good will to attract clients, to achieve credibility with Judges and to ease relationships with other counsel. In many cases,

clients may hire a particular attorney because of the attorney's affiliation with a certain law firm or a court may designate a lawyer as class counsel based on his or her firm's experience and reputation.

Calloway v. Marvel Entertainment Group, 854 F.2d at 1479.

The signature, when made on behalf of the firm, both in form and reality, is the law firm's certificate and its placement of its "shingle" on the court paper. The signature represents the law firm's undertaking, and, therefore, should be the law firm's liability when a violation occurs.

In the absence of an express preclusion of law firm liability or, for that matter, language specifically and affirmatively providing for such liability, this Court should look to the sources of law for an attorney's professional responsibility as well as the sound public policy expressed by the drafters of the amended Rule expanding lawyers' professional responsibility. Such analysis clearly favors law firm liability for litigation expenses incurred as a result of a violation of Rule 11.

II. THE AMENDED RULE WAS INTENDED TO STRENGTHEN PROFESSIONAL RESPONSIBILITY FOR THOSE WHO PLEAD CAUSES IN THE FEDERAL COURTS AND THEREBY IT CLEARLY PERMITS A LAW FIRM'S LIABILITY FOR THE VIOLATION OF ONE OF ITS MEMBERS

The stated purpose of Rule 11, as amended, was to strengthen the professional responsibility of lawyers who plead and try cases in the federal courts. Law firm liability for a violation of one of the lawyers assigned the matter within the professional organization, as related to the developing equitable remedy of litigation cost shifting, clearly facilitates the basic purposes of the Rule.

A. Amended Rule 11 Is the Primary Rule of the Lawyer's Professional Responsibility for the United States District Courts and Was Enacted to Deter Litigation Abuse.

The advisors state, as their basic purposes for the Rule's amendment, the following:

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses, in the signing of pleadings. . . .

Experience shows that in practice Rule 11 has not been effective in deterring abuses. . . . There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. . . . The new language is intended to reduce the reluctance of courts to impose sanctions, . . . by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable

doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. . . . Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification . . . of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. . . .

. . .

The new language stresses the need for some prefil-ing inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. . . . This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. . . .

. . .

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. . . . The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

ACN-1983 at 408 (West Supp. 1989).

B. Amended Rule 11 Is Consistent with the Canons of Professional Responsibility and the Fundamental Public Policy that Holds Professionals in All Walks of Life to the Highest Standards of Conduct.

Law firm liability is in complete harmony with often expressed judicial views of expected professional conduct and the consistency the professional must maintain with his code. The obligations which the Rule seeks to impose and the performance which it encourages, hopefully without court enforcement, fulfill the purpose of the Canons of Professional Responsibility. Undertaking and performing a representation only for a proper purpose and zealous advocacy within the bounds of the law are the consistent themes of both the Canons and Rule 11. Model Rules of Professional Conduct, Rules 3.1, 3.3, 3.4, 5.1 (1987); N.Y. Jud. Law-Code of Professional Responsibility, Canons 1, 5, 7, 8, 9 (McKinney 1975). See C.M. Shaffer, Jr. and P.M. Sandler, *Sanctions: Rule 11 and Other Powers*, 193-260 American Bar Association, Section of Litigation (2d ed. 1986-1987).

In other contexts, the federal courts, including this Court, have recognized the importance of professional responsibility in our society. The professional, trained in a special field of competence, must always perform consistent with required standards and react ethically from an honor code inculcated in the first years of professional education and adhered to throughout a lifetime of practice. A unique contribution in all fields of endeavor has rested on the efficacy of this learned competence and the unyielding integrity of a profession for its code of ethics.

In cases addressing the validity of professional opinions on issues such as whether there has been compliance with the registration requirements of the federal securities laws and upon the fairness and principled presentation of financial statements, it is well established that,

[i]n our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crow bar. . . . [T]hese ancient professions should not

be able to escape . . . liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented a knowledge they knew they did not possess.

United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964).

With respect to the accountant's professional responsibility, a profession where the certificate has been the traditional predicate for personal as well as derivative liability for the professional organization, this Court has recognized "the independent auditor's obligation to serve the public interest insures that the integrity of the securities markets will be preserved." *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984).

If petitioner's position were adopted, the federal courts would witness law suits against law and accounting firms in the securities law and financial services contexts, with significant defense costs and monetary liabilities, but a limitation on the liability of a law firm when such a suit was frivolous or improper. Certainly, the recognition of the lawyer's professional responsibility by his certification of court papers should be given an equal, if not greater, weight in this context to assure the integrity of judicial process.

C. Law Firm Liability Is Consistent with Longstanding and Fundamental Principles of Partnership and Agency Law.

Whether law firm liability is described as vicarious liability, *respondeat superior*, liability of the principal for the agent, or partnership liability, it is a liability which at its root, arises from the non-performance of supervisory responsibility by an organization for one of its members. See generally Prosser & Keaton, *The Law of Torts* § 69, § 70 (5th ed. 1984); R. Mallen & V. Levit, *Legal Malpractice* § 35 (2d ed. 1981); Annot. 70 A.L.R. 3d 1298 (1976); 53 Am. Jur.2d, *Master & Servant* § 417 (1970). Its fair limits, as recognized by the Uniform Law of Partnership from which the Court of Appeals took guidance in its opinion, are the regular course of employment and the authority given by the partnership for the activities of the partner. N.Y. Partnership Law § 24 (McKinney 1988); 854 F.2d at 1479.

The Rule, consistent with traditional principles of partnership and agency law, is appropriate to apply in this case. Here the partners, LeFlore and Pavelic, held themselves out to the community as partners. Here they admittedly, as is customary, shared in the profits and liabilities of their firm practice. At formation of the partnership, consistent with well settled law, they each became a general agent for the firm and agent for one another in their law practice. *Kimbrow v. Bullitt*, 63 U.S. 256 (1859); *Bell v. Morrison*, 26 U.S. 351 (1828); *Crawford v. Willing*, 4 U.S. 186 (1803); *Tillier v. Whitehead*, 1 U.S. 269 (1788).

This Court clearly recognized, in an analogous context where the signature of a firm name appeared on a surety bond, that the signature was intended to be the act of all the partners. Although only one partner was named in the legal document, joint and several liability was imposed on the partnership firm. In the case of a pleading or motion in federal court, too, "[t]he signature of the firm name shows that the instrument was intended to be the act of both partners, and effect must be given to it accordingly." *George v. Tate*, 102 U.S. 564 (1880).

Retention of a lawyer is retention of his law firm, and the law firm is traditionally liable to the client for the lawyer's errors, omissions and even fraud. *McIntyre v. Kavanaugh*, 242 U.S. 138 (1916); *Strang v. Bradner*, 114 U.S. 555 (1885); *Castle v. Bullard*, 64 U.S. 172 (1859); *Lichtenheld v. Bersen*, 247 A.D. 749, 285 N.Y.S. 585 (2d Dep't 1936); see generally R. Mallen and V. Levit, *Legal Malpractice* § 33 (2d ed. 1981).

The principles of agency and partnership law have also traditionally served to protect innocents where any organization, let alone a law firm partnership, has committed a wrong through a member or employee. *In Re McGuinness*, 69 A.D. 606, 74 N.Y.S. 1054 (1st Dep't 1902). They have been applied as settled principles consistently where lawyers practicing in law firms have committed wrongs in their professional capacities. Annot. 39 A.L.R. 4th 556, (1985); Annot. 70 A.L.R. 3rd 1298 (1976).

D. Law Firm Liability for Rule 11 Violations Creates an Incentive for Self-Regulation Necessary to Achieve the Professionalism Essential to Modern Federal Civil Practice.

Law partnerships do and are expected to establish internal controls so that all members and employees stay within the appropriate boundaries of competence and ethics. The fact that internal control is an essential for an adequate pre-filing inquiry was given clear recognition by the Second Circuit in its *Calloway* decision, when it observed:

The purposes of the 1983 amendment to Rule 11 will also be best served by holding law firms responsible for the acts of their attorneys. . . . Firm responsibility for Rule 11 sanctions will create strong incentives for internal monitoring, and greater monitoring will result in improved pre-filing inquiries and fewer baseless claims.

854 F.2d at 1479-1480.

Today, law firms range in size from the small firm, typified by the litigants and their representatives in this case, to multi-state and international organizations conspicuous for their varied specialty departments and participation in major and complex financial transactions and litigations. A survey of well recognized law directories (e.g., *Martindale Hubbel Law Directory* (121 ed. 1989)) demonstrates that these latter organizations predominate and are the point of future development in the law. The narrow interpretation of Rule 11 economic liability contended for by the petitioner would not only deny the reality of present-day law practice and its expected growth patterns, but, more significantly, nullify the essential dependency that adequate pre-filing inquiries have upon the "internal monitoring" of the larger law office organizations which practice throughout the country.

In cases of single practitioners and smaller firms, the Rule does contemplate and the courts have fairly considered individual financial circumstances and hardships in assessing the amount of the sanctions. *Doering v. Union County Board of Chosen*

Freeholders, 857 F.2d 191 (3rd Cir. 1988). Therefore, the strict limitation of liability to the individual attorney, which petitioner asks this Court to adopt, is not necessary for the protection of the smaller firms against abusive applications of the Rule. Petitioner's suggested limitation would only be a "loophole" for larger organizations and, certainly, for the unscrupulous.

Thus, the realities of modern law firm practice, especially in federal court litigation, require investing the District Courts with the power to hold a law firm liable as part of the Rule's development of equitable remedies, at least as far as the shifting of litigation costs are concerned.

If the Rule extends the liability of the lawyer, it should also fairly extend the liability of the law firm. The mutual choice of association justifies law firm liability, as the retention of the lawyer by the client justifies the client's liability for the lawyer's conduct.

Desired supervision for the purpose of promoting the client's cause easily adapts to the law office, preventing the advocacy of that cause from exceeding proper limits. Accordingly, if supervision of litigation lawyers working in professional organizations is to be encouraged, the Rule's enlightened interpretation and application in ordinary circumstances requires law firm liability.

E. Simplification and a Better Refinement of the Litigation Process Will Be Brought About with the District Courts Having the Power to Impose Litigation Costs upon Law Firms when They, through their Members or Associates, Violate Rule 11.

Rule 11's provision for a litigation abuse remedy in circumstances where the enforcement of traditionally imposed duties do not deter nor protect the victimized litigant supports the proposition of law firm liability. Strictness in the elements of pleading and proof with regard to legal malpractice, malicious prosecution and abuse of process have virtually eliminated litigation cost shifting to an adversary attorney.

In New York, for example, relief for professional negligence is typically not available to a third party in view of the contractual privity doctrine. *Singer v. Whitman & Ransom*, 83 A.D.2d 862, 442 N.Y.S.2d 26 (2d Dep't 1981); *Gifford v. Harley*, 62 A.D.2d 5, 404 N.Y.S.2d 405, (3rd Dep't 1978). Relief against the adversary attorney is available only in unusual circumstances where actual fraud or collusion can be shown. *Viscardi v. Lerner*, 125 A.D.2d 662, 510 N.Y.S.2d 183, 185 (2d Dep't 1986).

Malicious prosecution and abuse of process are also beyond the easy reach of most victims of litigation abuse. See generally Annot. 46 A.L.R. 4th 249 (1986); Annot. 97 A.L.R. 3d 688 (1980); V. I N.Y. Jur. 2d Interim Topics, *Abuse of Process* §§ 1-13, 1980.

Therefore, neither economic deterrent nor a remedy for the victim of litigation abuse⁶ was generally available in cases of the objective incompetence of the adversary lawyer. Now, however, the amended Rule does provide an equitable remedy to be efficiently administered by the tribunal which "has tasted the flavor of the litigation and is in the best position to make these kinds of determinations." *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985).

Significantly, the Rule attempts to remedy litigation abuse at its inception by the attorney's professionally mandated due diligence and the certification that the motivating purpose for the litigation is not an improper one. This prophylactic character of the Rule, as well as the prompt opportunity to address and correct an abuse in the court of occurrence certainly "help[s] to streamline the litigation process by lessening frivolous claims or defenses." ACN-1983 at 408 (West Supp. 1989).

In alleviating the hardships of traditional tort remedies and not deferring the vindication of the courts' process to another

⁶ This litigation abuse remedy is available, however, only in the context of the federal litigation where the violation occurs, and clearly does not create a substantive right entailing subsequent satellite litigation. *Port Drum Company v. Umphrey*, 852 F.2d 148, 150 (5th Cir. 1988).

proceeding at a substantially later time, justice under the Rule is done in the immediate case. This simplification and refinement of the litigation process does not reconcile with the absence of either law firm professional responsibility or liability, which is the consequence of petitioner's argument.

Lawyer's professional responsibility is integrally related to Rule 11 economic liability because the perception of an obligation most often follows the foresight of liability. Petitioner's argument against law firm liability, if adopted, would diminish the prospect of recovery and thereby demean the Rule to the uselessness of its antiquated version.

F. Law Firm Liability for Rule 11 Violations Will Not Stifle Legitimate Advocacy.

Law firm liability will not stifle legitimate advocacy. Lawyers choose to practice in professional organizations and to have those organizations minimize the effect of their human errors. This is the case as a result of the cross-checking of partners and supervisors as well as the assumption of financial responsibility through the possible availability of lawyer's professional liability insurance. It is this environment of group practice which enlarges the opportunities for creative and challenging advocacy. It does so far beyond the possibilities presented in a state of affairs where liability is limited to the lone writer of his own and his firm's name. Therefore, there is no valid policy reason to eliminate the liability of a law firm for one of its lawyer's Rule 11 violation.

Furthermore, after over five years of experience with the amended Rule, there is no reason to suggest that the federal courts as a whole have not properly interpreted and carefully applied the rule. A pattern of judicial wisdom and restraint in interpreting the Rule is evidenced in a selection of recent cases. These interpretations help to show that the imposition of law firm liability in appropriate cases should not be feared as a death knell for creative advocacy but a means for its achievement.

The lower federal courts have fairly applied the rule, even against the United States and a state as a litigant, *United States*

v. Gavilan Joint Community College District, 849 F.2d 1246 (9th Cir. 1988); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985) and exercised the necessary respect inherent in federalism by limiting sanctions to federal and not state court papers, albeit their actual filing or effect on a federal court proceeding, *Adduono v. World Hockey Association*, 824 F.2d 617, 620-621 (8th Cir. 1987).

They have recognized advocative courage even in the most sensitive of situations where the neutrality of a Judge was challenged, *In Re Norman Zalkind*, No. 88-1283 (1st Cir. March 31, 1989) (available May 1989, on LEXIS, Genfed library, Courts file), and acknowledged an equitable limitation on sanctions when the adversary withholds information, *Morda v. Klein*, 865 F.2d 782 (6th Cir. 1989); *Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006 (2d Cir. 1986).

The lower federal courts have clearly articulated the standards of due diligence required for attorneys pleading and litigating causes in the courts, *Truck Treads Inc. v. Armstrong Rubber Company*, 868 F.2d 1472 (5th Cir. 1989); *Chapman & Cole and CCP, Ltd. v. Itel Container International B.V.*, 865 F.2d 676, 683-685, (5th Cir. 1989); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987).

They have also strained to permit creativity, even in the face of a deficient pre-filing inquiry or a lack of proper motivation by deeming the rule as not violated if any reasonably competent attorney could arrive at the conclusion that the pleading or motion as a whole was not frivolous and improper, *Woodrum v. Woodward County*, 866 F.2d 1121 (9th Cir. 1989); *New Alaska Development Corporation v. Guetschow*, 869 F.2d 1298 (9th Cir. 1989); *Kale v. Combined Insurance Company of America*, 861 F.2d 746 (1st Cir. 1988); *King v. Idaho Funeral Service Association*, 862 F.2d 744 (9th Cir. 1988); *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877 (9th Cir. 1988); *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202 (9th Cir. 1988).

They have strictly sought to avoid the judgment of hindsight in their determination of when the Rule was violated. *Cunningham*

v. County of Los Angeles, 859 F.2d 705 (9th Cir. 1989); *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987).

In fashioning the cost shifting remedy, they have attempted precision in the allocation of what litigation costs flow from the violation, *Truck Treads Inc. v. Armstrong Rubber Company*, supra and recognized the applicability of the principle of the mitigation of damages, *Callahan v. Schoppe*, 864 F.2d 44 (5th Cir. 1989); *St. Amant v. Bernard*, 859 F.2d 379 (5th Cir. 1988); *Roberts v. Peat, Marwick, Mitchell & Co.*, 857 F.2d 646 (9th Cir. 1988); *Napier, Sr. v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080 (3rd Cir. 1988).

To prevent the Rule from becoming abusive, the courts have noticed and subjected those who make frivolous sanction motions to sanction, thus taking steps to prevent sanction motions from being purely retaliatory devices, *Partington v. Gedan*, 870 F.2d 464 (9th Cir. 1989).

Further evidencing the proper judicial restraint, the federal courts have resorted to the least onerous sanctions to accomplish the Rule's purposes, *Magnus Electronics, Inc. v. Masco Corporation of Indiana*, No. 88-1268 (7th Cir., March 22, 1989) (available May 1989, on LEXIS, Genfed library, Courts file); *Willy v. The Costal Corp.*, 855 F.2d 1160 (5th Cir. 1988); *United States of America v. Kahaluu Construction Co., Inc.*, 857 F.2d 600 (9th Cir. 1988); *Doering v. Union County Board of Chosen Freeholders*, 857 F.2d 191 (3rd Cir. 1988).

More comprehensive surveys contained in recent publications also show that the Rule's objectives are both compatible with law firm liability and the Rule will not become susceptible to abuse if such liability is imposed. See *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, American Bar Association Section of Litigation, June 1988; T.E. Willging, *The Rule 11 Sanctioning Process*, (Federal Judicial Center, 1988); C. M. Shaffer, Jr. and P.M. Sandler, *Sanctions: Rule 11 and Other Powers*, American Bar Association Section of

Litigation, (2d ed. 1986-87); C. M. Shaffer, Jr. and P.M. Sandler, *Sanctions: Rule 11 and Other Powers*, American Bar Association Section of Litigation (1986).

G. The Court of Appeals' Affirmance of Law Firm Liability in this Case Reflects a Well Reasoned and Careful Approach.

In respect to law firm liability, as the Second Circuit opinion evidences, there is a prudent recognition that exceptional circumstances, if demonstrated, can fairly limit the application of the law firm's liability in the particular case. 854 F.2d at 1479. Such construction of the Rule is not a rote application or improper legislative enactment of state agency or partnership law principles, as petitioner contends — but true judicial interpretation of a procedural rule within the court's everyday province.

Petitioner suggests that the Second Circuit's application of traditional principles of partnership and agency law in its decision has done violence to the amended Rule. To the contrary, the panel was only sensitively guided by these traditional principles and then matched their application to the Rule's purposes by reasoning,

Rule 11 sanctions should generally be imposed on a signer's law firm as well as on the individual signing an offending paper, although a district court may limit the sanctions to the individual signer where exceptional circumstances exist. Nothing in the language of the Rule prohibits this construction. . . .

. . .

Certainly, if a partner in a firm instructs an associate to sign a paper, basic agency principles suggest that the firm as principal should bear responsibility. . . . Under general partnership law, moreover, the partnership as a whole is responsible for the acts of a partner. The New York Partnership Law, while not controlling the interpretation of Rule 11, is nevertheless of

guidance. . . . Nothing persuades us that Rule 11 dispensed with this elementary principle of partnership law. . . .

. . .

[t]his interpretation will not greatly increase the amount of satellite litigation over the imposition of sanctions, because in most cases there will simply be no reason not to include the firm.

854 F.2d at 1479-1480.

In that context, the Second Circuit stopped short of the broadest possible application of the traditional principles of joint and several liability, so commonplace in the law that their explicit mention was probably not made by the drafters. In consequence, the Court of Appeals did achieve for the District Courts in its Circuit the flexibility sought by the drafters to the end of encouraging lawyers' professional responsibility.

H. The Adoption of a Fixed Rule Prohibiting Law Firm Liability Would Create the Potential for Unfair Avoidance of the Rule's Responsibilities and Diminish Public Respect for the Administration of Justice.

If the scope of amended Rule 11 were limited to apply only to the attorney who signed the papers and not to the law firm on whose behalf the papers were signed — as petitioner contends the Fifth Circuit has held — the deterrence of abuses which the amended Rule 11 was meant to provide would, in substantial part, be thwarted. A law firm could easily have the most impecunious or junior member sign the pleading and thereby avoid the imposition of sanctions. Such a law firm exemption would be unquestionably self-defeating, since "the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by mandating that the rule will be applied when properly invoked." ACN-1983 at 409 (West Supp. 1989). The very misconduct proscribed by the Rule would find a convenient and easy means of escape by too narrow an interpretation by the very

courts that are as victimized by contemporary litigation abuses as the parties. Nor can it be disputed that an illusion of a remedy is a worse prospect than no remedy at all.

Public confidence in the Courts is respect for the Judges and the lawyers who practice before them. An exemption for lawyers would be inequitable and would not promote professionalism in the administration of justice. It would damage it as well in other important contexts of society, and would certainly lessen public respect for the Courts.

The purpose of the Rule is crystal clear — to promote lawyer's professional responsibility and not to restrict it. Lawyers, especially trial lawyers, should be the best examples of professionalism; they are officers of the court and fiduciaries, both to their clients and to the judicial system in which they are privileged to practice their profession. *Theard v. United States*, 354 U.S. 278 (1956); *Ex Parte Wall*, 107 U.S. 265 (1882); *Baker v. Humphrey*, 101 U.S. 494 at 502 (1879); *In Re Cohen*, 370 F. Supp. 1166 (S.D.N.Y. 1973).

This copyright case, brought by a lawyer and sustained with the knowing participation of his law firm, was kept alive by a forgery allegation against another lawyer whose good standing had never been questioned. The baseless forgery charge caused the parties and the federal court a tremendous expenditure of money and a significant disruption of their good time away from other more meaningful pursuits. The case best expresses the necessity to enforce Rule 11 so that lawyers and their law firms, whether institutions or small associations of practitioners, will act to relieve the courts and the public of this type of wasteful and destructive litigation.

The case also best expresses that today lawyers' professional responsibility must mean fiduciary responsibility. A most eloquent spokesman of the common law expressed this standard of behavior as requiring "not honesty alone, but the punctilio of honor" and as such "an uncompromising rigidity has been the attitude of the courts of equity," to avoid the "disintegrating erosion of particular exceptions." The Court, as did Justice Cardozo by his judgements,

should not "consciously" lower the standards for any firm or its lawyers. *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1 (1928).

Thus, law firm liability, better described in this context as supervisory liability, because of the greater diligence it promotes, fulfills the meaningful purpose of the Rule. The Rule's goals, too, are reached without an increase, and, most likely, with a lessening of satellite litigation. Therefore, this Court should uphold the principle of law firm liability under the Rule.

CONCLUSION

Lawyers, who have chosen to practice in associations of professionals, should not object to being held responsible for the unprofessional behavior that is engaged in by their partners or associates. A rule which, in its very essence, defines and requires professionally proper conduct should not be frustrated by the narrow interpretation the petitioner advocates.

Rule 11 is the pre-eminent professional responsibility rule for the United States district courts. The fair imposition of economic liability upon law firms will make the lawyer and the law firm more aware of their professional responsibility and, as consequence, will accomplish the Rule's primary goal of preventing the abuse of our federal courts. This Court is asked to affirm the judgment below.

Dated: New York, New York
May 31, 1989

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORTHERN J. CALLOWAY, individually, and on behalf of
LMN PRODUCTIONS, INC.,

Plaintiff,

v. 82 Civ. 8697 (RWS)

THE MARVEL ENTERTAINMENT GROUP, et al.

Defendants.

June 27, 1986
12:30 p.m.

Before: Hon. ROBERT W. SWEET,

District Judge

APPEARANCES:

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THE COURT: Yes, gentlemen.

MR. SCHARF: Your Honor, the defendants have decided to proceed in the order of the caption. I can be quite brief, though, because I spent considerable time and I know your Honor will also have spent considerable time reviewing the written materials that we have submitted.

What shocks me about the response we have now received from the plaintiff and his counsel, and received I should note only yesterday afternoon, much later than had been directed by your Honor and promised, is the complete absence of a detailed, factual, candid response to the serious issues which we have raised at this stage of this proceeding.

There is not even an affidavit submitted by counsel, although if anyone has answers to the many questions we presented, it is the gentlemen sitting here who instead saw fit to sign a memorandum of law.

I should note as an incidental matter that there is not even an affidavit to support the assertion of threatened insolvency or financial straits on the part of Mr. Calloway, and perhaps, and I only read that part of the brief quickly, on the part of counsel as well.

Apart from tautologies piled upon tautologies, there is very little else in this memorandum of law. The argument is in substance that because whatever the plaintiff and his counsel were able to get away with, sufficed to get them to a jury, they should now be rewarded by immunity from Rule 11, section 505, and other sanctions that this court is well familiar with.

That is not the law. That could not be the law because if it were, that kind of a principle would reward precisely the big lie, the attorney willing to commit the gross impropriety, to the end of getting his multimillion dollar case against deep pocket defendants into the hands of the jury where, as we all know, anything can happen, within only those limits that the court is empowered to impose.

That was the name of this game, quite obviously from the very beginning. It was certainly the name of the game from the moment that the plaintiff concocted the script, later revised several times, set forth by the amended complaint.

Your Honor, because we have only been served recently with this set of papers, I have not had an opportunity to prepare any further memorandum of law, nor do I think it is necessary. Your Honor is aware of many cases, including decisions written by this court after trial, when conduct of this kind has received its proper reward.

I ask your Honor, in closing, only that Mr. LeFlore not be permitted at this stage to get away with the kind of casual, rhetorical, blunderbuss approach that somehow sufficed to get him all the way through that six week trial we all recently endured. The big lie, the gross impropriety deserves sanction beyond the normal range of sanction. Certainly not the reward that Mr. LeFlore has requested your Honor to give him.

Thank you.

MR. McKAY: Good afternoon, your Honor. I don't particularly enjoy my position here today. It is the first time in 17 years of practice that I have had to bring this kind of a motion, and unfortunately I think that the motion was and is necessary.

I don't really have a lot to add to my papers. I would like to say one thing on the opposing memorandum, and that is that it is basically premised on the erroneous assumption that if a plaintiff can survive a motion to dismiss or a motion for summary judgment or a motion for a directed verdict, then by definition they must win this motion, and I just don't think that is the right standard at all because otherwise, as we have suggested happened here, false affidavits can be submitted to defeat a motion and the plaintiff can thereby theoretically be immunized from sanctions or attorney's fees or costs, which simply can't be the right standard.

They also suggest that under section 505 of the Copyright Act, the required finding to award attorney's fees to a successful defendant is that the plaintiff be found to have acted in bad faith, and under the *Diamond v. Amlaw* decision, which is cited in our papers, that is not the correct standard. It is an objective one as to whether or not the copyright claim had merit rather than a subjective finding of bad faith, although I think that subjective finding can be made here as well.

Finally, your Honor, as to whether a further hearing should be held in connection with this motion, I just leave that up to your Honor. We would make ourselves available if you think that is appropriate.

Thank you.

MR. BRESLOW: Good afternoon, your Honor, Stuart Breslow, Brown & Wood, on behalf of Luis Quiros.

I just want to remind the court once again that we are in a somewhat different posture than the other defendants who are party defendants in this case.

Our motion is a motion pursuant to section 1927 of the Judiciary Code for vexatious multiplication of the proceedings in this case, and we are seeking sanctions against Messrs. LeFlore and Levites for their repeated conduct in failing to settle the case

on the terms that they ultimately agreed to stipulate to discontinue the case on.

Section 1927 — we are not seeking any costs under section 505 of the Copyright Act. We undertook this case as a pro bono obligation of the firm and we recognize full well that obligation. However, Messrs. LeFlore and Levites prolonged our participation in the litigation for reasons known only to themselves, they have never articulated them, and section 1927 relates not to parties but to the attorney responsible for the vexatious multiplication of the proceedings. And in section 1927 attorney's fees are distinct from costs.

Also under Rule 11, attorney's fees are distinct from costs, should the court decide to rely on Rule 11 rather than on section 1927.

Finally, I speak in opposition to, I really don't quite know what it was other than a frivolous aside in the last pages of Mr. LeFlore's and Mr. Levites' brief that was served yesterday afternoon, which purports to be a Rule 11 motion brought against the Brown & Wood firm. They seem to think that your Honor in his Solomonic wisdom will split the baby and give each of us a wash on Rule 11 motions.

THE COURT: Let me ask you, Mr. Breslow — obviously it goes without saying I like all things to go without saying. I am grateful to you for undertaking this. This came out of our Pro Se Office, and that was an operation which always doesn't work smoothly, but certainly did work effectively in this case.

Am I correct that what I have from you is your June 13th letter, period.

MR. BRESLOW: The June 13th letter is a supplement to the April 17th letter, which is a supplement to the April 2nd notice of motion which was still sub judice at the time that Mr. Quiros was stipulated out of the case.

THE COURT: That was a motion for costs —

BRESLOW: Under 1927.

THE COURT: Is there an amount set forth in there?

MR. BRESLOW: We thought that was presumptuous, your Honor.

THE COURT: I mean an amount of your time.

MR. BRESLOW: I did not do that either.

THE COURT: That's all I wanted to know.

MR. BRESLOW: It is not a massive amount of time. All we are seeking is from February 26th —

THE COURT: I understand.

MR. BRESLOW: The last point relates to this purported Rule 11 motion against the Brown & Wood firm by Mr. LeFlore and Levites. There was no motion noticed. It just seems to be a casual aside at the end of their papers. There is certainly no basis for their motion.

Our 1927 and Rule 11 motion is perfectly well grounded, as I have demonstrated previously.

Thank you, your Honor.

MR. SLOTNIK: Your Honor, if it please the court, I would like to do what I do best, which is read. I think you may have come to appreciate that over time, and frankly, what I would like to do in the brief time that I will talk to you is read from the plaintiff's brief which, after four years and two children who are now on the way to full maturity, never ceases to amaze me. I am reading from page 36, your Honor, as follows:

"Talking about imposing costs in connection with the copyright claim. Finally, only defendants against whom the copyright claim was brought may assert a claim for costs and fees. Thus defendants the Shukat Company and Scott and Peter Shukat have no right to those awards, including the mandatory award of costs."

Someone's memory is short term, your Honor, but I have a compartment which is long term. That compartment says the litigation was commenced in December of 1982. That Scott Shukat and the Shukat Company promptly moved under Rules 12 and 56 for summary judgment against the original complaint with no discovery, Judge. We just did it, as I'm sure you will recall.

In response to that motion the plaintiff and his attorney prepared I believe a 50-plus page brief, did not submit any opposing affidavits, did not seek to take any discovery or do anything else. The court did not grant the motion by a hair, and it was a technical reason, namely, the court decided to give Mr. Calloway an opportunity to properly replead the copyright registration portion of the allegations, and certain other technical matters with respect to its copyright claim. So that motion for summary judgment was held in abeyance. Up to that point we incurred whatever it was in the way of legal fees.

The bills I have requested from Mr. Scott Shukat, I am sorry I don't have them at the moment, but they are available. We received the amended complaint and history repeated itself, or at least I did because I read it and I moved for summary judgment again. This time I was getting a little bored because the allegations against the Shukat Company and Scott were basically the same, Judge, they had not altered. And this time, true to form, the plaintiff repeated itself, himself in that they once again filed a 50-page plus brief. This time I believe they may have filed an affidavit of Mr. Calloway, sort of in that very vague and conclusory way, opposing the motion.

They took no discovery. They asked for no time to develop any facts. And in December of 1983, the court granted us summary judgment, I will say it from a technical point of view, it was for

the first time, but truly, your Honor, one year later it was for the second time.

Now, I don't know where the plaintiff practices. I know they are in Manhattan, plaintiff's counsel, but where I come from, it seems to me if I have summary judgment dismissing the copyright claim, I'm the prevailing party under section 705. It is news to me that I have to go through a six week trial in order to demonstrate that I have prevailed on a claim which the court knocked out three years ago.

So the first response that I have to plaintiff's opposing papers is that we most certainly are in a very modest way, apart from any other considerations the court may have, we are entitled to our legal fees for the time, expense and effort involved in defending what was patently a frivolous claim as against the defendants that I represented. Nothing was ever proffered at any time in the four year course of the litigation to tie Scott and the Shukat Company into the case.

At the risk, I hope not of offending Norman, I would throw Peter Shukat in that category as well since he, too, was granted summary judgment at that time on the copyright infringement claim.

Now, the second part of it from my perspective is, as the court may remember, I don't wish to flatter myself so I will take a moment to remind you. We sort of opted out of the discovery process, and I know it is addressed in the other pleadings and papers presented by the parties, but, Judge, I would like to think that I can have somewhat of a dispassionate view about it despite my personal feeling, and what I can tell you is standing on the sidelines that I personally made no less than five discovery motions in 1984 and in 1985, at which point, in all candor, I just opted out of the process. It was too expensive, it was too time consuming.

The plaintiff's counsel is correct, but I believe in the most offensive way when they say somewhere in papers that we lost time

and again, time and again on motions. The court knows how many times we would show up on a Friday and interrupt a trial or something else that you were doing for purposes of getting rulings on questions. The court is aware that at some point it was required to impose a gag rule. The court is aware that at some point it was required to appoint the special master, and the court is also aware that between itself and the special master, counsel was fined \$3,500 on no less than three separate occasions.

Without putting a dollar amount on it and without suggesting that on each and every time that we were before the court on a discovery motion we were holier than thou, it seems to me that some portion of the fees should be awarded in recognition of the fact that, as plaintiff's counsel himself says somewhere in the papers, a case that possibly should have taken a year to prepare in pretrial discovery, took three-and-a-half.

The next to the last thing I would like to say has to do with our reinvolvement and reimmersion in the trial. We went to trial on one issue. We really only went to trial on one issue, which the court saw fit to reinstate at the conclusion of a pretrial conference in February 1986 pertaining to one fraudulent misrepresentation.

The court knows better than anyone that the trial was six weeks, and indicated at various times to counsel for all parties that it was unduly protracted, not properly prepared, and so on and so forth.

I truly believe as objectively as I can think about it that with respect to the period of time that I was involved on behalf of Scott and the Shukat Company, we are entitled to a portion of our fees, your Honor, on that claim as well.

I am not going to say to you, unlike some of my colleagues, and again I am marching a little bit to my own drummer, I really am, that Mr. LeFlore or his firm deserves to be sanctioned to the hilt under Rule 11 or section 1927, that everything that went on in the case, or even most of it, was vexatious, oppressive, duplicitous or any other kind of words you want to use, and I will tell you why, your Honor. I truly don't believe that, and I want to make that clear.

I believe that up to a point — in all candor, judge, I feel compelled to say this — that Mr. LeFlore represented his client to the best of his ability, and that the case on some issues went to the jury on a question of credibility of the witnesses and some dispute over the documents, but, your Honor, having said that, perhaps gratuitously in defense of Mr. Leflore, I also want to say the opposite in defense and in respect of my client, and that is that there was no reason the case should have taken six weeks. There was no reason that with respect to my clients in particular there should have been a trial at all, and somewhere between that vast sum of money which all of us are collectively seeking, and some modest amount of money, is an amount of money which is appropriate to award in favor of Scott Shukat and the Shukat Company.

And in that respect, judge, I want to close by saying one other thing. There is one thing in the plaintiff's brief, and I will try to keep the emotion out of my voice and say it as plainly as I can, and I want to read from the brief again because this one sentence I do find terribly personally offensive, your Honor. It is on page 11 of the brief and it is in a footnote. And what they said there was, "An integral part of section 505 of the Act is the judicial limitation imposed upon the amount of such costs or fees. Whereas here plaintiff, an individual already financially exhausted by this litigation, would certainly be bankrupted by the award sought, none should be awarded."

Your Honor, you heard from me many times that you know, apart from Dr. Klein, that Scott and the Shukat Company have no insurance. They, too, are financially exhausted and drained and not bankrupted, but in very dire straits as a result of the litigation. That's apart from the psychic punishment imposed for four years of having to strain that there would be an award of anywhere, depending upon the numbers, from \$11 million up to 30 odd million dollars for what is essentially, as it turned out, a nonsensical claim.

To put that particular sentence in this brief as a reason for not awarding any fees, costs or sanctions against Mr. Calloway or his counsel, who alluded to his own financial circumstances

at the very end of the brief, seems to me the final nail in this situation, the final piece of symmetry, which is a case that began as an outrage as far as I'm concerned, ended as an outrage with that statement.

Thank you, your Honor.

MR. ARNOFF: Your Honor, either I need the help of God or maybe one of the psychiatrists who testified, but I plus confess to you I really enjoy being a lawyer and I enjoy litigation and I enjoy trial work. I enjoy it because of the camaraderie of the people I work with and I usually enjoy it because of the challenge and the respect that I develop from my adversaries, and I enjoy it to the point where I usually can dust myself off and sort of massage my own wounded pride if the judge made a nasty or inappropriate remark, sometimes it is an appropriate remark, or my adversary made — wounded my feelings, and go onto the next case.

One thing I can't dust off about this case is the nature of the claim that was made against Peter Shukat, a lawyer, and I can't forget that that particular claim was the linchpin of this entire case and kept Peter Shukat as well as every other defendant in this case through four years of litigation.

I would ask your Honor to consider my letter reply to Mr. LeFlore and my papers, and I would also just briefly call your Honor's attention to Peter Shukat's testimony that was heard by your Honor in voir dire outside of the presence of the jury where Peter recounted a conversation that he had with Mr. LeFlore prior to the institution of the lawsuit where there was a demand on Peter to turn over his papers or his case files relative to Calloway, and Peter refused on the grounds that he had an attorney's lien and he had not been paid, and according to Peter, Leflore threatened disbarment.

I would also ask your Honor to consider that in November 1984 Pearl Tytell examined the challenged or disputed documents, that she received three checks with five signatures, that she did not

conclude that there was ever a facsimile signature or there was a forgery on these checks. That later on, through the course of discovery Calloway admitted that on the option or tie-in agreement his signatures were genuine; that later on in trial and in deposition before trial in this very courtroom before the special master I believe that Miss Tytell conceded in words or substance that the genuineness of the signatures on the option agreement would have forced her or any expert to conclude the genuineness of the signatures on the other agreements.

Notwithstanding, your Honor, that there was no ostensible basis to claim forgery, facsimile or document tampering, notwithstanding that LeFlore probably knew to the contrary, these claims persisted.

There was extensive discovery efforts by myself to pin down these claims, to get the substance of the expert report. There were court orders, your Honor, and special master's directions to get the plaintiff to substantiate through his counsel what were these serious allegations of forgery, facsimile, document tampering that Peter Shukat was responsible for and as a reason was maintained in this suit.

Calloway had a significant psychiatric history, your Honor, that was surfaced in the course of this litigation. Nonetheless, Mr. LeFlore permitted the kinds of claims that were asserted against Peter Shukat to be asserted through the course of the suit and up until the point when the case was submitted to the jury when your Honor removed from the jury's consideration the issue of forgery, facsimile signature and document tampering.

The charge against the lawyer that he fiddled with a document, that he forged a document, that he tampered with a document implies forethought, your Honor, of a criminal case down the road, of a disciplinary proceeding, of a potential disbarment proceeding.

If your Honor thinks of that logic, plus the conversation that Peter Shukat recounted that he had with Mr. LeFlore prior to

the inception of this lawsuit, even charity, your Honor, cannot excuse such conduct and such charges being made by Ray LeFlore.

Your Honor, the overall submission of this case to the jury doesn't excuse the claims of forgery, facsimile signature and document tampering against Peter Shukat, a member of the bar of the State of New York.

Your Honor by removing that issue from the jury said that no reasonable juror could believe that a forgery or facsimile or document tampering existed, and if that be the case, your Honor, then I respectfully submit there never was a basis in fact or law consistent with Rule 11 to make such a charge against Peter Shukat.

Thank you.

THE COURT: Mr. Brookman, you have improved in appearance.

MR. REZNIK: In standing in for Mr. Brookman, I would ask the court that our client is simply seeking the same relief as the other defendants.

Thank you.

MR. LeFLORE: There were a few things, your Honor, I did want to have on the record this morning.

First of all, I have a wife, two children. Last year I bought a dog. I am quite sensitive to the humanity of the Peter Shukat situation, and I am fully aware of the fact that it was not an easy trial for anyone.

I wanted also to mention, to remind the court that further than the evidence normally permitted in any trial, most trials, this trial permitted evidence to come in regarding my conversations with individuals and as a lawyer. I was not permitted then, nor should I have been permitted to take the stand and testify. The conversation to which Mr. Arnoff alludes never

occurred. The record should so reflect. What was said in the conversation was I called Mr. Peter Shukat to request copies of documents, originals from Mr. Peter Shukat, who was no longer representing my client. Mr. Shukat said he was asserting an attorney's lien and I said, "You are entitled to do so with respect to originals. You have all of the documents belonging to my client in your possession. If you require copies of those documents, you may retain the originals and under the law of the State of New York we are entitled to copies of such documents."

With respect to the motion itself, your Honor. We did not put in an affidavit or one of our client. This case was fully developed in discovery. It was a trial on the merits. It went to the jury. I do not know what your Honor might have done with respect to motions J.N.O.V.

We had a jury of six, which was my client's constitutional right. The jury determined he did not establish his case by a preponderance of the proof in the case or clear and convincing evidence, whichever, and they decided against him.

There is a strangeness developing in our system, your Honor, where a jury on the evidence before it was permitted to consider the case and could have returned a verdict for the plaintiff. The only proper way to view these motions, your Honor, is in the context of what if.

What if the jury had said we find for the plaintiff. Would the motions before your Honor be absurd? Would your Honor still be asked to go behind the jury verdict, behind your Honor's correct decisions, we believe, in permitting the case to go to the jury. I don't think that the advisory committee of the Supreme Court of this United States expected that an advocate, a lawyer would be placed in the position where he could win on the merits a litigation and have a trial by jury and an award by that jury in his favor, and still be subjected to Rule 11. It is a very bizarre concept, with all due regard to your Honor.

The problem that exists here, what I would like to address today with your Honor, is what is Rule 11 about. We stand, your

Honor, on record here, on your Honor's rulings and on your Honor's submission of the case to this jury, but that doesn't quite answer what Rule 11 is all about. I believe it was intended, your Honor, as a shield, a shield against baseless claims when a lawyer has to look at what's before him before he turns to file a pleading. We know what the Second Circuit has said. It has said that it has to be patently clear that claim has absolutely no chance of success.

How do you send a case to a jury that returned a verdict for the plaintiff and then have to, as a lawyer, be faced with a claim of violation of Rule 11.

I am not a new kid on the block. I graduated law school, law review, nine years at Sullivan & Cromwell, and I have a fairly decent practice, which in my opinion is generally highly regarded, at least my clients think so.

Strange that there should be reference in this courtroom to the motions made to your Honor, including the horrible costs of the special master because of LeFlore's conduct.

But I return, your Honor, to the question really before us, what is Rule 11 about. I will tell you in my view it is not an invitation to pierce the attorney-client privilege. There is no affidavit here either from my client as to what our conversations were, or my work product, or what I thought at what time, or what he said to me. It isn't necessary. There was a jury trial. But it is getting to the point, your Honor, where serious people are beginning to ask as lawyers every time Rule 11 is made or raised, am I obliged to throw my client to the wolves to protect me if there is a claim made? Do I have to take out my notes of conversations with him and say, this is what I was told. I don't think it is, your Honor. Not when it has gone to the jury.

The second aspect of it here, your Honor, is the constant reminder here of how it can be improperly, in my view, attempted to be used as a sword rather than a shield. I need not remind the court that every morning during the course of this trial, and let me divert a moment to mention for my partner's benefit,

I intend and I hope the court will hold defense counsel to the representation that Mr. Levites, coming late to this matter, certainly is not a subject of this motion.

Second, returning again, your Honor, to where I was, you will recall that every morning we would come into court and there would be a yellow piece of paper on the table of plaintiff's counsel, plaintiff's chair, and that piece of paper simply had written on it, "Rule 11."

How do we come as lawyers to the point where we are doing at night what we have to do, working until three in the morning, doing out best, and we have to come in in the morning and face that. I don't think that's what it was intended for, your Honor. It also is not intended in my view to become such a sword that it invites the kind of wedge between attorney and client that is clear here from the record.

How did we come to a point where we have stipulations offered which say: We will dismiss the case, counselor. No costs against your client, only against you. Is your client prepared to take the deal? Well, of course, my client wasn't prepared to take the deal.

How do we get to the point where we try to drive, use Rule 11, as has been done here, as a sword, a wedge to try to drive a wedge between attorney and client in that way.

I think there has to be, in my view, your Honor, serious thought given to what it is as lawyers, and if you please, your Honor, what role the court has to play in enforcing the standards, but also recognizing at the same time that if we get too far down this road, if we get too far down this road, judges will get very good at setting people up in the course of trial. If they can get to a jury, they get to the jury, and then they decide, goodness me, the jury could have decided in the plaintiff's favor, but let's see where we can find a hole to drive through some sanction or other, notwithstanding the horribly hard work put in representing our clients.

How do we get to the point where lawyers start believing when they are before the jury and after the jury verdict, how do we get to the point where the lawyers start believing that they still, still have some right or the clients have some right to say, forget the testimony at the trial, forget what their clients testified to, forget the evidence in the trial, that went to the jury, let's go back and look at every scrap of paper and see whether at that time we could have argued something else, whether those facts which were established at the trial didn't look quite the same way at that time before discovery. A bizarre concept, your Honor, in our view.

Finally — I don't want to keep the court much longer on this. I also asked the reporter to be here in order that, and I do invite your Honor to inquire of us as to any matter the court deems appropriate.

THE COURT: Thank you.

MR. LeFLORE: Thank you, your Honor.

THE COURT: Any reply?

MR. SCHARF: May I, your Honor, very briefly?

THE COURT: Sure.

MR. SCHARF: The suggestion that the offer we made during trial to allow Mr. Calloway to discontinue without risk of this motion, while preserving our rights as to Mr. LeFlore, was intended to serve as a wedge severing Mr. Calloway from his counsel is not only untrue, your Honor, but offensive.

This gentleman knows the offer was made at a time when plaintiff's case sought to create the impression that Mr. Calloway might suffer from less than a perfect memory, but was basically the decent personality our children watch on Sesame Street.

I made that offer at a time when I suffered that illusion myself and felt that Mr. Calloway, to the extent he had behaved badly

in the course of this proceeding by saying things that were not true, and demonstrably so, was merely doing the bidding of the true composer and author of this movie script, Mr. LeFlore.

When I examined Mr. Calloway at some length after making that offer, and looked him in the eye and heard from him the most incredible statements on a regular basis, heard him from one moment to the next, without reacting in any human way to the fact that he was doing so, lied even about something he had said to me a few moments before, I did withdraw that offer, your Honor.

My purpose in making the offer, my purpose in withdrawing the offer was not to create friction between Calloway and LeFlore, your Honor. It was to try to find a way to see that justice is done. I happen to believe in that.

I don't know Mr. LeFlore's wife, I don't know his children, I don't know his dog. I do know that his behavior here and in the years prior to today while this case was pending caused great anguish for many, many people, some of those people not being parties, your Honor, even attorneys who are not here today and who suffered from this case.

I am painfully familiar with the abuse very casually and without sensitivity of any kind heaped upon my client by this gentleman, who now asks for compassion.

The standard of Rule 11, the standard of section 505, the standard of section 1927 is not compassion, your Honor. If that were a factor that this gentleman could properly invoke, and he cannot, I submit. The standard is justice.

Thank you.

MR. SLOTNIK: Very briefly. I still would like to think that we follow a system of logic that goes back to the Greeks, so when Mr. LeFlore was speaking on the issue of sanctions, I tried to conceive of a set of circumstances wherein a jury verdict — a case could get to a jury and an attorney could still be subject

to sanctions under Rule 11, and lo and behold, in what passes my mind in my head, I was perfectly able to do it. So that contrary to Mr. LeFlore's sort of legal-medical conclusion that getting to a jury serves to inoculate you from Rule 11 sanctions, I really don't think that that's the case, and I would be willing to stand up in any medical or legal congress and make the same statement.

But to take it one step further, and hopefully for the very last time, hoisting him by his own petard, assuming that everything he said was true and that when the case gets to the jury it does immunize you from consideration of Rule 11 sanction, I remind the court that Scott, Peter and the Shukat Company never went to the jury on the issue of the copyright infringement.

Thank you.

MR. ARNOFF: Your Honor, very briefly. It seems to me that professional service and responsibility go to the essence of our society, more so than ever because of the complexities of technology, industry and the law itself.

I recall the decision in the United States v. Benjamin and Judge Friendly's language about the lawyer's opinion and the accountant's certificate, and we hold in litigation all professionals to a responsibility and to maintain high standard.

Rule 11 now talks in terms of certification of pleadings. The law requires honesty of expression and thought by the people that plead causes in the courts. I would ask your Honor, sometime, I believe it was the 31st of March, in response to your Honor's queries, Mr. LeFlore said about the claims concerning Peter Shukat:

The claim is that there are two pages of a document, the signatures of which were altered, and they were slapped onto another document which the man never saw or signed.

There never was any proof of that at trial. There never was any testimony as to that. Tytell never testified as to that. This

was a statement made to your Honor that never had a basis,
and that's how this case progressed.

THE COURT: Anyone else?

Thank you all. I will reserve decision.

RESPONDENT'S

BRIEF

Supplemental Complaint of the Plaintiff

October 10, 1979

PAVELLE & LAFLORE (now dissolved),

Plaintiff,

THE MARVEL ENTERTAINMENT GROUP, a division
of CANNON INDUSTRIES CORPORATION,
JAMES GALTON, AL BROOKER, MICHAEL S. KLEIN,
THE SHUKAT COMPANY, LTD., SCOTT SHUKAT
and PETER S. SHUKAT ESQ.,

Defendants.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT
AND IN RESPONSE TO THE MARVEL
ENTERTAINMENT GROUP, JAMES GALTON,
AL BROOKER, THE SHUKAT COMPANY, LTD.
AND SCOTT SHUKAT

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QUESTIONS PRESENTED

1. Does Rule 11 abrogate the liability that would normally be imposed upon a law firm for acts of its lawyers under principles of partnership law and agency?

2. Are the purposes of Rule 11 furthered by imposing sanctions for its violation upon a law firm as well as upon the individual who signs the offending paper on behalf of the law firm?

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INTRODUCTORY STATEMENT

Petitioner, the law firm of Pavelic & LeFlore (now dissolved) by Radovan S. Pavelic, appeals to this Court from the affirmance by the Second Circuit Court of Appeals of the District Court's judgment imposing sanctions of \$50,000 upon the law firm and its partners, jointly and severally, for multiple violations of Rule 11 of the Federal Rules of Civil Procedure during the conduct of a copyright infringement action against defendants. The District Court imposed the sanction at a Rule 11 hearing held as an ancillary proceeding after a six week jury trial resulted in a verdict for defendants on all claims alleged by plaintiff and prosecuted in his behalf by petitioner.

STATEMENT OF THE CASE

A. Pavelic's Role in the Calloway Case

On or about May 1, 1984, the law firm of Pavelic & LeFlore was formed in New York City (A, pp. 207 - 08)¹ by Radovan Pavelic and Ray L. LeFlore.² One of the partnership's principal assets was the prospect of a substantial monetary recovery, pursuant to a contingent fee arrangement (A, p. 197 Para. 40), from the proceeds of a litigation then pending in the United States District Court for the Southern District of New York entitled Calloway

¹ "A" denotes references to the Joint Appendix. "PC" denotes references to the Petition for Certiorari.

² Mr. Pavelic claimed that Pavelic & LeFlore was not formed until October 1984, while Mr. LeFlore stated that it was formed on May 1, 1984. (A, pp. 207 - 08). As seen *infra*, the discrepancy is not material, although the District Court gave Mr. Pavelic the benefit of the doubt (PC, p. 147a).

v. The Marvel Entertainment Group, et al. (the "Calloway case"). Pavelic & LeFlore represented the plaintiff in the Calloway case from its formation in 1984 until the fall of 1986.³ The amended complaint, filed August 1, 1983, sought recovery of \$11 million in actual damages and \$33 million in punitive damages (A, p. 56), for a total of \$44 million, so that if its client had succeeded, Pavelic & LeFlore stood to realize a considerable sum of money pursuant to its contingent fee arrangement (A, p. 208).

Not only did the Calloway case represent a principal asset of Pavelic & LeFlore, it occupied an enormous portion of the law firm's time and resources as

³ Prior to the formation of Pavelic & LeFlore, Ray LeFlore had represented Calloway as a single practitioner and for a brief time as a partner in the firm LeFlore & Egan.

well. For example, Pavelic & LeFlore advanced more than \$60,000 in out-of-pocket expenses in connection with the Calloway case (PC, p. 64a). The first deposition in the case was not taken until November 6, 1984, after the formation of Pavelic & LeFlore. Thereafter, more than 40 days of depositions of 18 witnesses were taken in the case (A, p. 196, para. 36), the majority of which were taken by Pavelic & LeFlore (A, pp. 195-96).

In June of 1985, the District Court fined Pavelic & LeFlore \$1,500 for discovery abuses, and Radovan Pavelic wrote the checks on behalf of Pavelic & LeFlore to pay those sanctions (A, pp. 206, 210-11). The trial, which took place in April and May of 1986, took six weeks, generating 4433 pages of trial transcript and hundreds of exhibits (A,

pp. 195 - 96). As stated by his partner, Ray L. LeFlore:

"... Mr. Pavelic was intimately involved (and kept apprised) of, all developments and strategy decisions in this action (Calloway v. Marvel et al.) and would obviously have benefited directly from any recovery in the same proportion as I ..."

(A, p. 206, para. 2; p.208).

As the Second Circuit itself concluded:

Moreover, Pavelic himself was no passive observer in the Calloway litigation. He has admitted that he "often discussed" the case with LeFlore, that he attended several depositions and days of trial, and that he insisted that Raymond L. Levites be retained as special counsel for the trial. The firm's role was thus typical rather than exceptional.

(PC, p. 64a).

Given the monetary importance of the Calloway case to Pavelic & LeFlore, and the enormous time constraints it imposed upon what was a two-man law firm

(Messrs. LeFlore & Pavelic) (Petitioner's Brief, p.4), it is not surprising that Mr. Pavelic would have taken a keen interest in this case. Indeed, it would have been irresponsible of him to do otherwise.

B. The Sky rider Project And The LMN Agreements

Calloway's claims focused on a fledgling motion picture script written by him in 1979 entitled "The Sky rider", which he intended to become an animated science fiction musical (A, p. 16, Para. 23). For the next two years, Calloway and his personal manager Scott Shukat and The Shukat Company, Ltd., unsuccessfully attempted to raise funding for, and to interest motion picture companies in, this would-be project (PC, p.9a). In December 1980, Mr. Calloway fortuitously met Luis Quiros, an insurance salesman, and

Michael Klein, a dentist, who expressed an interest in trying to get the project off the ground (Id.). Together they formed a company called LMN Productions, Inc. ("LMN"). LMN derived its name from the first name initials of Luis Quiros, Michael Klein and Northern Calloway. Various agreements were entered into among LMN, and Messrs. Quiros, Klein and Calloway, defining the rights of those parties in the "The Sky rider". These agreements were prepared by Calloway's longtime attorney, Peter S. Shukat, and another attorney, Egon Dauler (the "LMN agreements").

In the meantime, Mr. Klein, through a neighbor, arranged in March 1981, to present "The Sky rider" project to James Galton and Al Brodax at Marvel Productions ("Marvel"). A presentation was made to Marvel by Messrs. Calloway,

Klein and Quiros in an effort to interest Marvel in taking some role in the project. Marvel indicated that it might be interested in doing the animation work for the film if production costs of \$5 million could be raised from outside sources (PC, p. 9a).

Toward the latter part of 1981, Marvel prepared a presentation booklet for "The Sky rider" for use as a professional sales piece in efforts to raise financing for the film. LMN commissioned Marvel to prepare this booklet, pursuant to the authority vested in LMN under the terms of the LMN agreements (PC, p. 12a). While these efforts were continuing, Marvel entered into formal agreements with LMN, signed by Messrs. Calloway and Klein on behalf of LMN (Id.).

Financing for the project was never raised. The rights to "The Sky rider" reverted to Mr. Calloway in late 1982, pursuant to the terms of the LMN agreements. Mr. Calloway never again attempted to raise financing for this project, and let it lapse.

C. The Original Complaint With The LMN Agreements

Mr. Calloway retained Ray L. LeFlore in the latter part of 1982, and the Calloway case was commenced in December 1982. Named as defendants were virtually everyone with whom Mr. Calloway had come in contact in connection with this project - - Marvel, James Galton, Al Brodax, Michael Klein, Luis Quiros, Scott Shukat, The Shukat Company, Ltd., Peter Shukat and Egon Dumler. Nine causes of action were asserted, including copyright infringement (the only federal claim),

fraud, breach of an attorney's professional obligations and conspiracy, all in connection with "The Skyrider". The gist of Calloway's alleged grievances was that the defendants had conspired to bastardize his work product, principally through Marvel's preparation of the presentation booklet for "The Skyrider", and convert his work product to their own use.

The original complaint had annexed to it copies of the LMN agreements, all bearing Calloway's signature (A, pp. 21-22, Para.47). The terms of these agreements provided a complete defense to the claims asserted on Calloway's behalf, since they assigned the rights in "The Skyrider" to LMN, which in turn authorized defendants to engage in activities with respect to "The Skyrider" project, including preparation

of the allegedly offensive presentation booklet. Defendants moved to dismiss the complaint on the basis of this defense. The complaint was instead dismissed on the narrow ground of failure to allege copyright registration, with leave to replead.

D. The Amended Complaint Without The LMN Agreements

The amended complaint was filed on August 1, 1983. The LMN agreements were no longer annexed to it. Instead, the amended complaint now alleged that Mr. Calloway's signature on those agreements was a "facsimile" affixed to the agreements without his authorization (A, pp. 47 - 48). Later papers filed on behalf of Calloway left no doubt that Calloway and his attorneys were accusing defendants of forgery.

E. The Summary Judgment Motion

After the amended complaint was

served, defendants moved for summary judgment on the basis of the complete defense provided by the LMN agreements. The District Court (Sweet, Robert J.) denied their motion on July 3, 1984 on the single ground that Calloway and his counsel had submitted a memorandum (A, pp. 77 - 78) and a sworn affidavit (A, p. 60) claiming that Calloway's signature on the LMN agreements had been forged (A, pp. 88 - 93). Since these very agreements had been annexed to the original complaint with no claim of forgery, the District Court expressed its reservations about the claim of forgery by warning Calloway and his counsel that the Court would not hesitate to impose sanctions at the conclusion of the case if the facts so warranted (A, pp. 91 - 92).

The Calloway affidavit in opposition to the summary judgment motion contained the following assertions:

6. On July 29, 1983, I caused my Amended Complaint in this action to be served in accordance with this Court's order dismissing the original complaint. The Amended Complaint alleged the same operative facts as the original complaint -- viz., Marvel's preparation of a derivative work based in large part on my script for "The Sky rider", and Marvel's display through-out the entertainment industry of that infringing work in cooperation with Klein and Quiros, among others. However, I did not refer to, or annex, those documents which, I learned in the interim, had been contrived and forged by defendants. Instead, the Amended Complaint charged:

52. On or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a

series of documents, back-dated to June 8, 1981, purporting to confirm by formal agreement the terms and conditions of a putative option for LMN to acquire "THE SKYRIDER".

The documents referred to above, which I believe Peter Shukat contrived (and others perhaps forged) while he was my attorney and trusted advisor, are: the option agreement, the writers agreement and the composition agreement, all dated June 8, 1981 [the LMN agreements], annexed to the original complaint as the second, third and fourth documents, respectively, comprising Exhibit C.

A, p.60, Para.6 (emphasis added).

The memorandum of law which accompanied that affidavit was signed by plaintiff's then counsel Ray L. LeFlore. Mr. LeFlore acknowledged that the LMN agreements provided a complete defense to Calloway's \$44 million claims, and stated quite tellingly:

The only basis on which defendants could hope to obtain summary judgment in their favor is their claim that plaintiff signed or approved the [LMN] agreements on which they purport to rely.

Plaintiff's Affidavit, sworn to April 2, 1984, unequivocally attests that he neither signed nor approved the agreements on which defendants purport to rely.

* * *

There could be no clearer statement that defendants have nothing authentic on which to rely.

Defendants' motions for summary judgment, before discovery, must be denied.

(A, pp. 77 - 78).

F. Calloway's Handwriting Expert

Four months later in November 1984, the law firm of Pavelic & LeFlore retained a handwriting expert, Pearl Tytell, to examine Calloway's signature on the LMN agreements. Mrs. Tytell did not opine that Calloway's signatures had

been forged, but instead confirmed their likely authenticity, a fact which was not revealed to defendants' counsel, despite numerous discovery requests (A, pp. 184 - 185), until the middle of the trial one and a half years later (A, p. 183, Para. 21).

G. The Reassertion Of The Forgery Accusations

Despite the serious and potentially criminal nature of charges of forgery and document tampering, Calloway and Pavelic & LeFlore repeated these same accusations on several occasions even after Mrs. Tytell's negative opinion, in a series of motion papers and discovery responses filed with the District Court by Pavelic & LeFlore, in 1985 and 1986 (PC, pp. 38a-39a; A, pp. 184-185). All of these papers were in the following format:

Pavelic & LeFlore
By Ray L. LeFlore /s/

(A Member of the Firm)
Attorneys for Plaintiff

Because Calloway's claims of forgery and the merits of his claims in general were so patently frivolous and often incoherent, defendants' counsel, during the course of the litigation, repeatedly warned Calloway's counsel that they would seek sanctions at the conclusion of the litigation (A, p. 170, Para.4), as the District Court itself had done. Such warnings fell on deaf ears, as the only settlement demand ever made on plaintiff's behalf was on July 10, 1985 for \$6 million (A, p. 197, Para.38).⁴

⁴ The spuriousness of Calloway's claims on liability was compounded by the fact that he apparently had no provable damages whatsoever, much less \$6 million or \$44 million (PC, pp. 98a - 99a; A, pp. 188-189). Calloway did not even retain an expert on damages until three weeks before the trial. At the trial, said expert could not opine that plaintiff suffered the damages that

Plaintiff's pre-trial order, filed in March 1986 shortly before the trial (A, pp. 110 - 150), reiterated the claim that Calloway's signature had been forged on the LMN agreements (A, pp. 123 - 24). Then in a letter from Calloway's counsel to the District Court less than one week before the trial, a completely new gloss was put on plaintiff's claims.⁵ Pavelic & LeFlore stated that the claim now was that there were "white-out" irregularities on the LMN agreements (PC, pp. 27a-28a). This claim turned out to be such nonsense that the District Court did not submit it to the jury (Id. at 31a; 111 F.R.D. at 647, n. 2).

he claimed (Id.).

⁵ This letter, which amended plaintiff's pre-trial order, did not formally abandon the forgery claim, but simply did not mention it (PC, p. 65a).

H. The Trial

At trial, Calloway admitted that he had "no real evidence" of forgery.⁶ He further testified that he was prompted by his counsel to make the forgery claim because his counsel told him that a document examiner stated the signatures were not genuine (A, pp. 219 - 224), though in fact Mrs. Tytell had said just the opposite (A, p. 183, Para.21).

At the conclusion of the six week trial, the jury delivered a verdict in

⁶ The accusations of forgery were not limited to Peter Shukat, but were asserted against all defendants:

On July 29, 1983, I caused my Amended Complaint in this action to be served . . . However, I did not refer to, or annex, those documents which, I learned in the interim, had been contrived and forged by defendants. (emphasis added).

Calloway Affid. of April 2, 1984, A 60, Para.6.

favor of defendants on all counts after only six hours of deliberations. Defendants thus had to endure nearly four years of litigation, facing claims of \$44 million, consuming enormous amounts of money, and the time of defendants, their counsel and the District Court, on the basis of assertions against them that were completely false. Defendants had spent more than \$900,000 in attorneys fees to defend these spurious claims (PC, p. 32a).

I. The Rule 11 Sanctions

Defendants then all moved for sanctions against plaintiff and his counsel under Rule 11, Federal Rules Civil Procedure, and otherwise. These motions were supported by affidavits detailing the sad history of this litigation (See, e.g., A, pp. 152-

198). No affidavits in opposition were submitted by either plaintiff or his counsel. The District Court held a hearing and then wrote a lengthy opinion (PC, pp. 72a - 142a; 111 F.R.D. 637), awarding defendants approximately 22% (\$200,000) of the amounts they had expended in defending the litigation, to be borne equally by Calloway and his counsel (*Id.* at pp. 129a - 135a).

Mr. Pavelic thereafter moved to relieve Pavelic & LeFlore from the sanctions imposed against it, claiming that they should be imposed only against his now former partner Ray L. LeFlore individually. The District Court then wrote a further opinion (PC, pp. 143a-159a; 650 F.Supp. 684), dividing the \$100,000 in sanctions as against the attorneys as follows: \$50,000 against Ray LeFlore individually and \$50,000

against him and Pavelic and LeFlore jointly and severally (*Id.* at 156a), the division roughly corresponding to the length of time that Pavelic and LeFlore had participated as a firm in the litigation.

The Second Circuit Court of Appeals wrote a lengthy opinion (PC, pp. 1a-71a; 854 F.2d 1452) in which it affirmed the sanctions imposed against Pavelic & LeFlore and Ray LeFlore, and remanded the case to the District Court to determine whether the sanctions that had been imposed against Calloway should be imposed instead against his counsel, in whole or in part. One reason that the Second Circuit took this action was because Pavelic & LeFlore, despite a clear conflict of interest, which was even brought to its attention (A, p. 172, n), represented Calloway throughout

the Rule 11 proceeding (PC, pp. 49a-55a). The remand proceeding has been stayed by the District Court pending certiorari.

The only issue for which review is sought in this Court is whether sanctions were properly imposed against Pavelic & LeFlore, which represented Calloway from its formation in 1984 through the trial in 1986, until after the conclusion of the Rule 11 proceeding. The Second Circuit explained its reasons for affirming the award against Pavelic & LeFlore (PC, pp. 59a-66a), reasons which we believe conclusively support the result reached.

SUMMARY OF ARGUMENT

A. Rule 11 does not abrogate or abridge traditional common law and statutory responsibility of law firms for acts of their lawyers. The

draftsmen of Rule 11 were aware that the practice of law is often conducted in partnership form where the firm and each partner is responsible for the actions of other partners, and the firm and its partners are responsible for the actions of their employees. If the draftsmen intended to change the well known legal consequences of these relationships, they could have done so by expressly providing exculpatory language to that effect in the Rule.

B. It is the firm which is the attorney of record under Rule 11; the signer is merely acting on its behalf. When a member of a firm signs a court paper, it is the signature of the firm in a representative capacity with the attendant liability, just as the firm would be liable if a partner signed any other legal document on the firm's

behalf. Federal and state statutory and common law principles of partnership and agency uniformly impose responsibility upon law firms for the actions of their lawyers. New York Partnership Law §24 (McKinney's), which applied to the New York partnership of Pavelic & LeFlore, provides:

Where, by an wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

C. The principal purpose of Rule 11 is to heighten professional responsibility and reduce the burden on the federal courts by assuring that filings of court papers are preceded by a due diligence inquiry into the

underlying facts and law. That purpose is furthered, instead of thwarted, by imposing responsibility for its breach upon the law firm on whose behalf the individual attorney has signed.

D. Given the egregious circumstances of this case, it was clearly proper to hold the law firm responsible under Rule 11, as well as the individual attorney who signed on behalf of the law firm.

ARGUMENT

POINT 1

FUNDAMENTAL PRINCIPLES OF PARTNERSHIP AND AGENCY LAW MAKE A LAW FIRM RESPONSIBLE FOR THE ACTS OF ITS PARTNERS

Long established common law principles of partnership law make a partnership liable for the acts of its partners. This is because a partner is an agent of the partnership. This fundamental principle is firmly embedded

in the federal common law (see, e.g., Strang v. Bradner, 114 U.S. 555, 561-62 (1885); George v. Tate, 102 U.S. 564 (1880)), as well as that of the states (see, e.g., Eppes v. Snowden, 656 F. Supp. 1267, 1279 (E.D.Ky. 1986); Northwestern Nat. Bank of Minneapolis v. Fox & Co., 102 F.R.D. 507, 511 (S.D.N.Y. 1984)). In many instances, states have codified these principles in statutory form, similar to the Uniform Partnership Act. Id.

Section 24 of the New York Partnership law (McKinney's), applicable to the law firm of Pavelic & LeFlore, provides as follows:

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is

liable therefor to the same extent as the partner so acting or omitting to act.

See, Metflex Corp. v. Klafter, 123 A.D. 2d 845, 507 N.Y.S. 2d 460 (2d Dep't 1986), where partners A and B were held subject to sanctions for violation of state court orders by partner C. This is consistent with the holding of this Court in Strang v. Bradner, supra, 114 U.S. 555, 561-62 (1885), imputing the fraud of one partner to his other partners.

POINT II

RULE 11 WAS NOT INTENDED TO ABROGATE OR ABRIDGE THE LIABILITY OF A LAW FIRM FOR THE ACTS OF ITS PARTNERS.

Neither the language of Rule 11 nor its legislative history expresses any intent to abrogate the general rule that a partnership is liable for the acts of its partners. Petitioner's brief turns

this analysis on its head by assuming the conclusion to be proved, i.e., that the Second Circuit engaged in an improper legislative function by expanding Rule 11 to apply to law firms, as well as to the representatives of law firms who place their individual signatures on papers filed in court.

The Second Circuit, however, did not expand Rule 11. It simply interpreted the Rule's coverage by applying long and firmly established legal principles of partnership and agency.⁷ While the issue at hand is interpretation of a civil rule, and not a penal statute, the words of this Court

⁷ In a very real sense, moreover, a law firm is as much a signatory on a pleading as is the individual attorney who signs on behalf of that law firm. In the instant case, papers were filed with the court with Mr. LeFlore signing on behalf of Pavelic & LeFlore.

on the latter subject bear mentioning here:

Statutes, including penal enactments, are not inert exercises in literary composition. They are instruments of government, and in construing them "the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." United States v. Whitridge, 197 U.S. 135, 143.

United States v. Shirey, 359 U.S. 255, 260-61 (1959).

Rule 11 was intended to elevate the standards of practice in the federal courts; not, as Petitioner suggests, by shifting responsibility from law firms to individual attorneys in law firms, but rather by making that responsibility co-extensive.

Indeed, so fundamental are the foregoing principles of partnership and agency, that a review of Rule 11 decisions demonstrates that the federal

courts have routinely imposed sanctions against a law firm on whose behalf a lawyer signed a paper in violation of Rule 11, often without discussing the issue Petitioner has now raised. See, e.g., Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F.Supp. 1519 (N.D.Cal. 1984), aff'd, 790 F. 2d 1421 (9th Cir. 1986); Rice v. Hamilton Oil Corp., 658 F.Supp. 446 (D.Colo. 1987); M.S.Chambers & Son, Inc. v. Tambrands, Inc., 118 F.R.D.274 (D.Mass. 1987); Chapman & Co'le v. Itel Container Int'l B.V., 116 F.R.D. 550 (S.D.Tex. 1987); Anshutz Petroleum Marketing Corp. v. E.W. Saybolt & Co., 112 F.R.D. 355 (S.D.N.Y. 1986); Shults v. Henderson, 110 F.R.D. 102, 103-04, n.2 (W.D.N.Y. 1986); Itel Containers Int'l Corp. v. Puerto Rico Marine Management Inc., 108 F.R.D. 96 (D.N.J.

1985); Golden Eagle Distributing Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D.Cal. 1984), rev'd on other grounds, 801 F. 2d 1531 (9th Cir. 1986).

The principal case relied on by petitioner is Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987).⁸ We respectfully submit that the

⁸ Petitioner also cites and relies upon another Fifth Circuit case, Thomas v. Capital Security Services, Inc., 836 F.2d 866 (5th Cir. 1988), which simply harkened back in a footnote to its prior decision in the Robinson case (836 F.2d at 875, n.13). Petitioner also relies upon In re Ruben, 825 F.2d 977 (6th Cir. 1987), cert. denied, 108 S.Ct. 1108 (1988). The court there held, inter alia, that attorney Ruben could not be sanctioned under Rule 11 because he did not sign any of the papers filed in federal court (825 F.2d at 984). The distinguishing factor, however, is that attorney Ruben was not part of the law firm representing the plaintiff who brought the frivolous action. Rather, Ruben was a law professor whose assistance and advice were sought by the attorney who did represent the plaintiff. (825 F.2d at 980). The Sixth Circuit remanded the case to the District Court to explore whether Ruben could be sanctioned on a

Fifth Circuit was wrong in concluding that only the individual who signs a paper submitted to federal court, and not the law firm on whose behalf the individual signs, can be held liable for sanctions under Rule 11.

In so concluding, the Robinson court did not discuss or even refer to principles of partnership law and agency, which compel the opposite conclusion. Moreover, the principal rationale for the court's decision seemed to be its concern that holding the law firm liable would generate "satellite litigation" to determine the relative culpability of the different attorneys involved (808 F.2d at 1129). As the Second Circuit, however, observed in its opinion in the Calloway case:

basis other than Rule 11 (Id. at 990-91).

Contrary to the belief of the Robinson court, this interpretation will not greatly increase the amount of satellite litigation over the imposition of sanctions, because in most cases there will simply be no reason not to include the firm.

854 F.2d at 1480. Moreover, in most instances where Rule 11 sanctions are sought, an opportunity to be heard is generally afforded to both sides, whether on papers or in open court. The court can thus deal with all issues simultaneously, avoiding any problem of satellite proceedings or litigation.

Other courts that have addressed the issue have reached the same conclusion as the Second Circuit in this case. For example, in United Services Funds v. Ward, 121 F.R.D. 673, 677-78 (D.Alas. 1988), the Court held:

Any sanctions to be imposed upon the lawyers here should be imposed upon the law firm

as a whole, and no sanctions are imposed upon Mr. Lewis individually. While Mr. Lewis signed the opposition, he did so on behalf of the law firm; the signature line reads "Birch, Horton, Bittner, Pestinger & Anderson", "By Stanley T. Lewis." The firm itself is the signatory and should be treated as such. The firm through Mr. Petumenos, the partner to whom Mr. Lewis reported, controlled the file. Where a partner controls a file and an associate makes a representation which the materials in the partner's hands make sanctionable, the firm should bear the sanction.

Similarly, in Alcan Aluminum Corp. v. Lyntel Products Inc., 656 F.Supp. 1138 (N.D.Ill. 1987), the Court disagreed with the Robinson case, and noted that to adopt the position advanced by Petitioner would anomalously be contrary to jury instructions routinely given in federal courts:

We instruct jurors that whatever a person is legally capable of doing he can do through another person by

causing that person to perform the act. E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 12.07 (3d. ed. 1977); Committee on Federal Criminal Jury Instructions of the Seventh Circuit, Federal Criminal Jury Instructions of the Seventh Circuit, § 5.07 (1980).

656 F.Supp. at 1140, n.4.

In another, but related, context, it was held that Congress, in enacting the securities laws, expressed no intent to disregard relevant principles of partnership and agency:

Plaintiffs assert that virtually every issue of law or fact relevant to Fox or the named Fox partners, is common to the class by virtue of the fact that all class members are jointly and severally liable for the acts their co-partners performed in the course of partnership business. Defendants respond that traditional principles of partnership liability do not apply in the context of plaintiffs' federal security claims. Thus, argue defendants, plaintiffs will have to prove individual

knowledge of or participation in the alleged wrongdoing on the part of each Fox partner. As set forth below, this Court does not agree.

Defendants do not question the widespread application of partnership principles in other areas of the law. New York's statute providing for joint and several liability among partners for torts, including fraud and misrepresentation, committed by co-partners in the ordinary course of partnership business, is typical of the laws of other states. See New York Partnership Law §§ 24, 26 (McKinney 1948); Halperin v. Edwards and Hanly, 430 F.Supp. 121 (E.D.N.Y.1977); Uniform Partnership Act, Sections 13, 15; 60 AmJur2d Partnership §§ 162, 163, 168. Therefore, we are unwilling to find that Congress intended to supplant such principles in the securities context, absent clear evidence to that effect. See SEC v. Management Dynamics, Inc. 515 F.2d 801, 812 (2d Cir. 1975).

Northwestern Nat. Bank of Minneapolis v.

Fox & Co., supra, 102 F.R.D. at 511.

The Federal Rules of Civil Procedure are to be liberally, and not

strictly, construed "to secure the just, speedy, and inexpensive determination of every action," as mandated by Rule 1.

G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989) (en banc). In that case, the Seventh Circuit held that a federal court had the power to order parties, even those represented by counsel, to appear before it in person at a pretrial conference to discuss settlement. The Seventh Circuit so held despite the negative implication in Rule 16 which refers to "attorneys for the parties and any unrepresented parties." (871 F.2d at 650):

Because the rules form and shape certain aspects of a court's inherent powers, yet allow the continued exercise of that power where discretion should be available, the mere absence of language in the federal rules specifically authorizing or describing a particular judicial procedure

should not, and does not, give rise to a negative implication of prohibition.

871 F. 2d at 651-52. In so ruling, the Circuit Court relied in part upon this Court's decision in Link v. Wabash R.R., 370 U.S. 626 (1962).

It would be truly anomalous to suggest, as petitioner does, that because Rule 11 does not specifically incorporate the law of partnership and agency, that it was meant to preclude the courts from applying that law to hold law partnerships liable for the acts of their partners. The Federal Rules should not be construed so narrowly where to do so would detract from the overall purpose of the Rules and the quality of representation in the federal court system.

POINT III

THE PURPOSES OF RULE 11 ARE FURTHERED, RATHER THAN HINDERED, BY HOLDING A LAW FIRM, AS WELL AS THE INDIVIDUAL WHO SIGNS ON ITS BEHALF, RESPONSIBLE FOR ANY VIOLATION.

The purposes of Rule 11 were discussed at length in Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531, 1536 (9th Cir. 1986). The court there recognized that the principal purpose, as expressed in the Advisory Committee Notes to the 1983 Amendment of Rule 11, was "to reduce frivolous claims, defenses or motions." (Id.). Clearly this purpose is furthered, rather than obstructed, when a law firm is responsible for all papers filed bearing its name, regardless of which lawyer signed on its behalf. Such responsibility encourages law firms to develop and utilize systems of control

and supervision over the activities of the lawyers within the firm.

On the other hand, to restrict responsibility for Rule 11 violations only to the individual attorney who signs on behalf of the law firm fails to achieve the control and supervision that law firm liability stimulates. Moreover, it could result in some law firms' routinely having papers signed by the same attorney, whether the most impecunious, the most junior, or the least ethical. At other times, such as, for example, when a paper filed in federal court is the work product of a group of attorneys at a law firm, as is often the case, the imposition of sanctions only upon the individual who signed on the law firm's behalf would allow other culpable attorneys to evade the sanctions imposed by the Rule.

POINT IV

UNDER THE EGREGIOUS CIRCUMSTANCES OF THIS CASE, IT WAS CLEARLY PROPER TO IMPOSE SANCTIONS UPON PAVELIC & LeFLORE PURSUANT TO RULE 11

Because of the equitable overtones of Rule 11, the Second Circuit in the instant case did not go so far as to hold that a law firm would be responsible in every instance for a violation of Rule 11 by one of its lawyers signing on its behalf. It allowed for "exceptional reasons not to do so" (PC, p. 64a), and found that such reasons were not present in the instant case, a finding that has overwhelming support in the Record. Compare, Eppes v. Snowden, supra, 656 F. Supp. at 1279-81.

The two-man law firm of Pavelic & LeFlore stood to reap substantial benefits if this lawsuit had been

successful. They had a contingent fee arrangement with a \$44 million claim. Moreover, they treated it like a \$44 million case. They advanced \$60,000 in disbursement costs. They participated in 40 days of depositions of eighteen different witnesses, the majority of which were noticed by them, and all of which took place after the formation of Pavelic & LeFlore. To paraphrase the Second Circuit, Mr. Pavelic could not have been a "passive observer" under such circumstances.

Nor do you have to be a litigator to know that you don't accuse people of forgery and document tampering without having some reasonable degree of proof that it occurred. Even corporate lawyers should know that (see Petitioner's Brief, p.4).

The facts set forth in the Statement of the Case, supra, demonstrate that it was clearly proper to impose sanctions upon Pavelic & LeFlore.

CONCLUSION

We respectfully request that the judgment of the Second Circuit Court of Appeals should be affirmed in all respects and that the remand proceeding in the District Court should proceed forthwith, as directed by the Court of Appeals, together with costs awarded to respondents.

Dated: June 1, 1989

Respectfully submitted,

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REPLY

BRIEF

2
No. 88-791

Supreme Court, U.S.
FILED

JUN 30 1988

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

PAVELIC & LEFLORE (now dissolved),
Petitioner,
v.

THE MARVEL ENTERTAINMENT GROUP, a division of
CADENCE INDUSTRIES CORPORATION, JAMES
GALTON, AL BRODAX, MICHAEL S. KLEIN,
THE SHUKAT COMPANY, LTD., SCOTT SHUKAT and
PETER S. SHUKAT, ESQ.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This brief is respectfully submitted in reply to the briefs of respondents The Marvel Entertainment Group, James Galton, Al Brodax, The Shukat Company, Ltd., and Scott Shukat (hereinafter the "Marvel Brief") and of respondent Peter S. Shukat, Esq. (hereinafter the "Shukat Brief").

ARGUMENT

I. Respondents' Interpretation of Rule 11 Should Be Rejected Because It Ignores the Plain Language and Meaning of the Rule

Respondents' arguments have entirely lost sight of the star that, under the established precedents of this Court, is the guide to interpretation of Rule 11, Fed.R.Civ.P. That star, of course, is the "plain language" and meaning of the Rule. *Schiavone v. Fortune*, 477 U.S. 21, 30 (1986).

Rule 11 mandates that a district court confronted with a document signed in violation of the Rule:

shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

For the purposes of this case, the "person who signed," under the Rule, is "at least one attorney of record in the attorney's individual name . . ." The elaborate construct posited in the Shukat Brief (pp. 20-25)

wherein this language is violently contorted into "a two signature requirement" (*Id.* p.20) abandons all pretense of faithfulness to the plain language of the rule. Indeed, the sheer length of Shukat's exposition demonstrates its utter lack of textual support.

Shukat's contention that "[i]t certainly cannot be the physical act of signature that is the meaningful predicate for the Rule's liabilities" (Shukat Br., p.24) is itself a betrayal of the plain language of the Rule. The very act of signature, the significance of which is derided by Shukat, is given meaning and mandated by the Rule. Such a signature "constitutes a certificate by the signer . . ." that he or she has met the Rule's explicit standards. It is for example, this representation by an individual attorney that allows a pleading to be filed and considered by the court; correspondingly, it is this certification that – when shown to be false – subjects the signer to sanctions.¹

¹ As a leading commentator has observed:

[the court of appeals' decision in *Calloway*] lacks any textual support in the Rule. The Rule provides that the violation consists in *signing* a violative paper and, where that has occurred, the court is directed to impose a sanction "upon the person who signed it [the paper], a represented party, or both . . ." (emphasis added). The Rule clearly prohibits the use of a firm's signature as opposed to that of an individual lawyer . . . in stark contrast to the practice in some state courts. The *Calloway* rationale is also inconsistent with the holding . . . that Rule 11 sanctions are not properly imposed for conduct that does not involve the signing of a violative pleading, motion or other paper . . . "

G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 5(E)(i) at 78 (Michie 1989).

II. Respondents' Reliance Upon General Principles of Partnership and Agency Law Cannot be Reconciled with the Language and Purpose of Rule 11

Respondents' invocation of general principles of partnership and agency law (Shukat Br., pp. 29-32; Marvel Br., pp. 26-39) similarly runs afoul of the ineluctable textual mandate of the Rule, which demands the certification of an individual attorney, and correspondingly provides for the punishment of that attorney.²

As is demonstrated below, respondents' attempt to draw guidance from general principles of partnership and agency law which are premised in the goal of compensation of victims of a partner's acts (Marvel Br., pp. 26-28, 36-37; Shukat Br., pp. 29-30), is inapt in the context of Rule 11. Rule 11 is carefully crafted to deter abuse by the threat and actuality of sanctions against the "individual" signer of papers in federal litigation. "Compensation is not a goal of Rule 11, but it may be an appropriate subsidiary objective in selecting a *sanction*." Third Circuit Task Force Report, p.40 (emphasis supplied). Indeed, to the extent that state law would thwart Rule 11 by

² The Advisory Committee stated its view that the judicial response to a violation was to be "sanctions," "stress[ing] a deterrent orientation in dealing with improper pleadings, motions or other papers." ACN-1983 at 409 (West Supp. 1989). " 'Sanctions' suggests punishment. The sanctions mandated by the amended Rule in the event of a 'violation' are 'disciplinary'; they 'may include' expense shifting, but they need not do so." *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11*, p.11 (Burbank ed. 1989) (citation omitted) (hereinafter "Third Circuit Task Force Report").

diffusing the personal effect of Rule 11 sanctions among many lawyers, the Rule must control. *Hanna v. Plumer*, 380 U.S. 460 (1965).

Nor can respondents' law firm liability theory be reconciled with the intent of the Advisory Committee, as revealed in the Committee's Note, which makes repeated reference to the signing attorney,³ and in the December 1981 Memorandum from the Chairman and Reporter of the Advisory Committee. (AA 15).⁴ The fact that many

³ The Advisory Committee's Note adjures the courts "to avoid using the wisdom of hindsight and . . . [to] test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or other paper was submitted." ACN-1983 at 408 (West Supp. 1989). The Note suggests that the reasonableness of the signer's conduct be tested by "such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information . . . ; . . . or whether he depended on forwarding counsel or another member of the bar." *Id.* It expressly reaffirms the applicability of the Rule "to anyone who signs a pleading, motion or other paper," *id.* at 409, and emphasizes the discretion and flexibility available to the courts in tailoring sanctions according to "the state of the attorney's or party's actual or presumed knowledge" *Id.* Sanctions are to be imposed, in the court's discretion, "on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading" *Id.*

⁴ The Shukat Brief offers an entirely unconvincing attempt to reconcile its theory of law firm liability with the intent of the Advisory Committee that the individual attorney who signs a paper be held responsible, regardless of his status as the "senior" or "junior" attorney on the case. (See Shukat Br., p. 22).

attorneys practice in firms (Shukat Br., p.31), was certainly known to the rulemakers who promulgated Rule 11 in its present form.

III. The Principle Goal of Rule 11 is the Deterrence of Abuse Rather Than Fee Shifting

The principal focus of Rule 11 is upon deterring abuse. See, e.g., *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 877 (5th Cir. 1988) (*en banc*); *Brown (Neely) v. Federation of State Medical Boards of the United States*, 830 F.2d 1429, 1438 (7th Cir. 1987); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (*en banc*); *In re Yagman*, 796 F.2d 1165, 1183 (9th Cir.), *amended*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 108 S.Ct. 450 (1987).

Thus, contrary to respondent Shukat's suggestion that law firm liability is essential to effect Rule 11's supposed objective of shifting litigation costs (Shukat Br., pp. 31-33),

[r]ule 11 sanctions should not be viewed as a general fee-shifting device. By and large federal courts are bound by the "American Rule," requiring parties to shoulder their own legal expenses . . . This Rule applies in the absence of specific statutory authorization for thrusting the winner's counsel fees on the losing party. . . .

The Rules Enabling Act, 28 U.S.C. § 2072, bars enactment of substantive provisions as rulemaking. The Advisory Committee, aware of this limitation, consequently did not intend to effect a major change in the American Rule in the guise of expansive Rule 11 sanctions. Complete or partial fee-shifting is but one form of disciplinary action which a court may invoke in appropriate circumstances.

Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987). See also *Mihalik v. Pro Arts, Inc.*, 851 F.2d 790, 794 (6th Cir. 1988); *Pony Express Courier Corp. of America v. Pony Express Delivery Service*, 872 F.2d 317, 319 (9th Cir. 1989). But see, *Hays v. Sony Corp. of America*, 847 F.2d 412, 419 (7th Cir. 1988).

Indeed, an earlier position in which a non-willful violation of the Rule would automatically trigger fee-shifting, and in which "sanctions" would be reserved for willful violations (see AA 12-13), was ultimately rejected by the Advisory Committee (AA 26-27). See also, Third Circuit Task Force Report, pp. 37-38.

IV. Respondents' Policy Argument Cannot Defeat The Textually Mandated Application of Rule 11

Respondents' policy argument that law firm liability will promote internal controls cannot defeat the Rule's mandate. *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). Such considerations of policy may not supplant the rulemakers' evident intention that violators be deterred by the certain knowledge that they cannot "pass the buck."⁵ Similarly, respondents' fear that Machiavellian lawyers bent on abusing federal courts will front an impecunious or junior lawyer to sign pleadings (Shukat Br., pp. 38-39; Marvel Br., p. 41) was considered

⁵ Respondents do not even attempt to find sense in the anomalous result, mandated by their vicarious sanctions argument, that Radovan Pavelic may be personally punished for the sanctions imposed on petitioner in this case because, fortuitously, petitioner was a partnership rather than a professional corporation. See *Paciello v. Patel*, 83 A.D.2d 73, 443 N.Y.S.2d 403 (2d Dep't 1981).

and rejected by the rulemakers as sufficient reason to extend liability for sanctions (AA 15). There is no indication in decisions reported under Rule 11 that such practices are plaguing the federal courts and a shift in the calculus of the Rule should abide both that event and the "extremely careful" procedures that attend the amendment of the Federal Rules of Civil Procedure. See 12 C. Wright & A. Miller, *Federal Practice and Procedure*, §3152, at 220 (1973).

V. Injustice Will Result from Exposing to Rule 11 Sanctions Lawyers Who Have Not Violated the Rule

This case demonstrates the injustice likely to attend the imposition of liability on lawyers who have not violated Rule 11.

The Marvel Brief begins and ends with inflammatory assertions regarding the claimed financial significance of this case to petitioner. (Marvel Br., pp. 2-6, 42-43). The record below, however, suggests that Ray LeFlore, Esq. never intended petitioner to be the full beneficiary of any recovery obtained. (See Affidavit of Radovan S. Pavelic, Esq., dated September 17, 1986, in Support of Motion for Relief Under Rule 60(b), Fed.R.Civ.P., at ¶¶15-17) (hereinafter the "Pavelic Affidavit").

This lawsuit, which the district court found to be not well grounded in fact from the time of its filing by Ray L. LeFlore, Esq., then of LeFlore & Egan, Esqs., proceeded for over two years before LeFlore combined with Radovan S. Pavelic, Esq. to form petitioner. (Pet. App. C, p. 54a). Nearly all of the offending papers, including the Calloway affidavit in opposition to respondents' motion

for summary judgment (A., pp. 58-71), had been filed, and respondents' motion for summary judgment decided, prior to the formation of petitioner (A., pp. 88-93).

While respondents pointedly jab that one need not "be a litigator to know that you don't accuse people of forgery and document tampering without having some reasonable degree of proof that it occurred" (Marvel Br., p. 43), nowhere below is there an allegation or proof that Radovan Pavelic knew of the lack of basis for the "facsimile" claim that prompted the sanctions below.

There is no reason to assume that Pavelic, a corporate, banking and real estate lawyer (Pavelic Affidavit, ¶20), knew – nor did he have a Rule 11 obligation to know – of the defect in this case any more than LeFlore would have known of any defects in contractual clauses Pavelic drafted. Cf. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980).

While respondents are not wrong in their arguments that Rule 11 was intended to "strengthen professional responsibility" (Shukat Br., p.26; Marvel Br., p.25), such arguments "taken out of context, . . . [are] incomplete and potentially misleading. The Advisory Committee had in mind particular 'abuses.' It sought to define more precisely the duties imposed on those signing papers in federal court and to ensure that individuals responsible for violations of those duties would be disciplined." Third Circuit Task Force Report, p. 13.

The harm done to petitioner by the imposition of a sanction in this case is enormous, and transcends the significant monetary penalty imposed by the district

court.⁶ At stake are the professional reputations of petitioner and its non-offending member, Radovan Pavelic. See, *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986); Third Circuit Task Force Report, p. 27.

It is respectfully submitted that the sanctions were improperly imposed upon petitioner.

CONCLUSION

The judgment of the court of appeals, insofar as it affirmed the imposition of Rule 11 sanctions upon petitioner and remanded this case to the district court for consideration of the imposition of additional sanctions against petitioner (See Pet. App. A, p. 71a), should be reversed.

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July 3, 1989

⁶ Respondents suggest that Rule 11 sanctions may be mitigated by "the possible availability of lawyer's professional liability insurance." (Shukat Br., p.34). In fact, petitioner's insurance carrier has disclaimed coverage for the sanctions in this case. See Affidavit of Radovan S. Pavelic, dated September 9, 1986 at ¶7; see also, Third Circuit Task Force Report, pp. 90-91.